BURNIE PORT AUTHORITY

v.

GENERAL JONES PTY. LIMITED

HIGH COURT, AUSTRALIA
MASON CJ, BRENNAN, DEANE, DAWSON,
TOOHEY, GAUDRON & McHUGH JJ.
[F.C.94/011]
24 MARCH 1994

TORT: Whether Ignis Suus rule still survives in Australia - Whether the rule in Rylands v. Fletcher has been encompassed by the development of the modern law of negligence - The rule in Rylands v. Fletcher and law of negligence compared - Whether the occupier of premises is liable to pay damages for a fire caused by the negligent manner of welding by an independent contractor - Whether the rule in Rylands v. Fletcher required to be incorporated into the law of negligence - Judicial consideration of the effect of such incorporation.

The Burnie Port Authority (BPA) had engaged an independent contractor W & S for the installation of additional refrigeration in the extension of the existing building called stage-2. In the original building called stage-1., General Jones Pty. Ltd. ('General') had let out cool rooms where it had stored large quantity of vegetables. The work of installation of refrigeration involved considerable welding and use of a large quantity of expanded polystyrene (EPS). The EPS though containing retardant chemicals to inhibit ignition, if brought into sustained contact with a flame or burning substance could be set alight and once ignited dissolves into a liquid fire and burns with extraordinary ferocity increasing in geometric proportion. Thirty cardboard cartons of EPS under the brand name "Isolite" was to the knowledge of BPA stacked together by W & S in an area under the roof of stage-2 where it was carrying out extensive welding activities. Employees of W & S carried out the welding activities in a negligent manner resulting in sparks or molten metals falling on the cartons of Isolite which began to burn fiercely and spread from stage-2 to stage-1 destroying the vegetables stored by General in cold rooms occupied by them.

General sued BPA and W & S in the Supreme Court of Tasmania. Neasey J. awarded damages to General applying the '*Ignis Suus*' rule against BPA and holding that W & S's liability resulted from "Ordinary Negligence".

BPA appealed to the full Court which dismissed the appeal and affirmed BPA's liability but however held the basis of BPA's liability to be not on the '*Ignis Suus*' rule but on the general common law rule in *Rylands v. Fletcher*.

On appeal by the BPA, General sought to sustain the judgment in its favour on three distinct grounds namely (i) the *Ignis Suus* principle (ii) *Rylands v. Fletcher* liability (iii) ordinary negligence as in *Donoghue v. Stevenson*.

Held:

(i) On whether the Ignis Suus rule was applicable

Per Mason CJ, Deane, Dawson, Toohey & Gaudron JJ.

[1] The liability of an occupier for damage caused by the escape of fire from his or her premises is a special rule which has its base in the ancient custom of England. This rule was progressively modified in England by legislation and the English legislation was subsequently adopted by a number of Australian legislatures. But however the cases decided by the High Court of Australia establish that under the common law of Australia any special rule relating to the liability of an occupier for fire escaping from his premises has been absorbed into and is qualified by more general rules of principles.

[2] The ruling in *Hazelwood v. Webber* and other cases justify the conclusion that the old special rule relating to liability for escape of fire has been absorbed into the principle of '*Rylands v. Fletcher*'. There is no reason in principle or policy for the preservation of the special *Ignis Suus*

rule in Australia, conditions being quite different from that of England. Further the development of the modern law of negligence and general principles dealing with escape of dangerous substances render the special rule unnecessary. The liability of BPA to General must be founded otherwise than on the *Ignis Suus* rule. The *Ignis Suus* rule does not survive in Australian common law and the English statutes and their Australian equivalents connected with the said rule can generally be treated by the Courts of Australia as no longer applicable.

Per Brennan J:

The Australian law took a different path from the English law repudiating the *Ignis Suus* basis of liability as inappropriately rigorous. The movement from strict to qualified liability in tort which has long been judicially noticed assisted first in the statutory qualification of *Ignis Suus* and in its absorption in the rule of *Rylands v. Fletcher*. Therefore the Full Court was right in rejecting the *Ignis Suus rule* basis upon which Neasey J. held BPA liable.

Per McHugh J:

The *Ignis Suus* principle is not part of the common law of Australia and liability for fire is not subject of a special common law rule. It is covered by the rule in *Rylands v. Fletcher*. Therefore the Full Court of the Supreme Court of Tasmania was right in rejecting the argument based on the *Ignis Suus* principle.

(ii) *On whether BPA liable under the rule in Rylands v. Fletcher or under ordinary principles of negligence*

Per Mason CJ, Deane, Dawson, Toohey, Gaudron JJ:

[1] The true rule of law laid down in *Rylands v. Fletcher* has been all but obliterated by subsequent judicial explanations and qualifications. The *Rylands v. Fletcher* liability has come to depend on all the circumstances surrounding the introduction, production, retention or accumulation of the relevant substance. The presence of reasonable care or the absence of negligence in the manner of dealing with the substance or carrying out an activity may be considered as a relevant factor in determining whether the use of land is "special" and "not ordinary". One of the factors would be whether the defendants have been guilty of negligence in a case involving damage caused by the escape from their premises of a dangerous substance and it will be relevant to the question of whether the defendants' use of the premises was a "natural" one. The question whether there has been a non-natural use in a particular case is a mixed question of fact and law involving the ascertainment and assessment of relevant facts and the identification of the content of the legal concept of a "non-natural" use. It may be misleadingly converted into a pure question of fact or a pure question of law. It is not possible to extract any principle from decided cases to lay down the basis for determining the twin requirements of something which is "dangerous" and "non natural" use. The rule in *Rylands v. Fletcher* has been progressively weakened in that it does not impose a liability which does not otherwise exist. The concept of 'proximity' and 'duty of care' is common to negligence cases. The result has been that ordinary negligence has encompassed and overlain the territory in which the rule in *Rylands v. Fletcher* operates.

[2] The main argument supporting the preservation of the rule in *Rylands v. Fletcher* is that the rule cannot be accommodated within the principles of ordinary negligence without denying liability in cases where it would otherwise exist. The duty of care arising under the ordinary law of negligence, the standard of care required is that which is reasonable in the circumstances. In a case that might attract the *Rylands v. Fletcher* rule, the standard of care depending upon the magnitude of the danger may involve a degree of diligence so stringent as to amount to a guarantee of safety. The rule in *Rylands v. Fletcher* should be seen for the purpose of common law of Australia as absorbed by principles of ordinary negligence.

[3] On an analysis of the evidence the carrying out of welding activities in stage-2 where cardboard containers of Isolite were stacked was itself a dangerous activity in that it was reasonably foreseeable that unless special precautions were taken the cardboard cartons of Isolites may be set alight. Evidence disclosed that BPA was aware that the cardboard

containers of Isolites were being stored in the roof area near where welding work was to be carried out by W & S. The overall work of the independent contractor was a dangerous activity involving a real and foreseeable risk of a serious conflagration unless special precautions were taken to avoid the serious risk of fire which BPA owed General and the duty of care was non delegable to the extent of ensuring that the independent contractor took reasonable care to prevent Isolite being ignited by reason of welding activities which care W & S did not take. The liability of BPA is founded on ordinary principles of negligence. The appeal is dismissed.

Per Brennan J:

[1] If the rule in *Rylands v. Fletcher* is held to be absorbed in the expanding law of negligence a plaintiff who suffers loss by the escape of a dangerous thing from the defendants land would go remedyless unless the plaintiff could prove negligent conduct leading to the escape on the part of the defendant. In *Rylands v. Fletcher* a claim for damages would lie without proof of any negligence causing or contributing to the escape. The exercise of care is irrelevant. The question whether land or premises is being reasonably applied to an "ordinary purpose" is a question which provides the Court with considerable guidance and a question the Court is well suited to answer. The basis of the rule in *Rylands v. Fletcher* as laid down in *Benning v. Wong* is that the bringing of the things with mischievous possibilities or propensities upon land create a duty to confine them there. The harm they do by escaping could not occur but for the fact of bringing them to the place from which they escape.

[2] In the present case isolite packed in cardboard cartons were brought to BPA premises by W & S. It was not of danger unless the cartons were ignited. But the cartons of Isolites were stored near the welding site. The carrying out of welding near a stack of cartons of Isolite and stacking of cartons of Isolites near the welding operation were acts done on the initiative of the employees of W & S and it is they who acted in breach of elementary precautions and it would be wrong to find that BPA expected that they would act in that way. The acts which caused the Isolites to ignite were the unauthorised and negligent acts of W & S. If the BPA had authorised the stacking of the cartons of the Isolite near the welding site it would have been responsible for an unusual and dangerous use of the premises and it would have been liable to General Jones under *Rylands v. Fletcher*. The welding and the bringing of cartons of Isolites into the roof were the accepted incidence of construction of the cold storage extension. That work was an ordinary purpose to which the premises were reasonably applied by the occupier. BPA authorised a natural use of its premises and therefore were not liable under *Rylands v. Fletcher*.

[3] There is no duty to take reasonable care on the part of an employer merely because damage might be done if the independent contractor authorised to do an act adopts a careless method of doing it and no liability is imposed on the employer merely because damage is done by the carelessness of the method adopted. The employer is not responsible for the independent contractor's collateral negligence.

[4] In the present case though BPA can be taken to have authorised welding in the roof void and storing Isolite in the roof void, those activities were necessarily involved in constructing the cold storage extension. Neither of these activities could have caused damage to General provided W & S performed the work without negligence. It is the act of welding near the stack of Isolite cartons and the method of doing the work incidentally employed by the contractor, an act of collateral negligence which resulted in the conflagration and for which BPA is not liable. Therefore the appeal is allowed and order of the Full Court set aside.

Per. McHugh J:

[1] The authoritative exposition of the rule in *Rylands v. Fletcher* in *Hazelwood v. Webber* by Gavan Duffy CJ Rich, Dixon and McTiernan JJ. has proved a satisfactory guide to its proper application. In England the position is different as the *dicta* of the English cases on the rule are not easy to reconcile. To evaluate the rule in terms of the English cases would be to ignore the significant Australian contribution to the understanding of the rule. *Rylands v. Fletcher* contains a common law principle and not a statutory enactment. While applying the common law it is not the function of the Judges to frame or to lay down hard and fast rules. Irrespective of whether

the rule in *Rylands v. Fletcher* is or is not a satisfactory ground of tortious liability, for more than one hundred years it has been treated in Australia as a settled rule of liability in no way dependent upon proof of negligence. With great respect to those of the contrary opinion it is not seen as to how consistently with the settled doctrine of this Court the liability of an occupier of land under the rule in *Rylands v. Fletcher* can be understood as assimilated or be incorporated into an occupier's liability in negligence. The difference between an action for negligence and an action based on the *Rylands v. Fletcher* rule is that the occupier of the land is not liable under *Rylands v. Fletcher* unless the escape of the dangerous substance was the result of a non-natural use of the land. Non-natural use has been explained in *Hazelwood* to mean some special use which brings with it an increased danger to those outside the land.

[2] The argument of Counsel for General that the manner of performing an operation was relevant to the issue of a non-natural use is liable to be rejected. Circumstances are relevant to the issue of 'non-natural' use. Manner of performance is not. In an action for negligence the defendant is liable only for damage which is reasonably foreseeable which is not the case in *Rylands v. Fletcher*. The ruling of the House of Lords in *Cambridge Water Co. v. Easter Counties Leather Co.*, applying the remoteness rule on the basis that the *Rylands v. Fletcher* action was an extension of the action for nuisance is inconsistent with the rationale of the rule in *Rylands v. Fletcher*. The proposition that if liability exists under the rule in *Rylands v. Fletcher* it is highly likely that the liability will arise under the ordinary principles of negligence is unacceptable and '*Hazelwood*' itself is an answer to that proposition. As long as the law is that a person is not liable in negligence for a reasonably foreseeable risk of injury unless a reasonably practical alternative means of avoiding the risk was also available to the defendant, liability will continue to exist under *Rylands v. Fletcher* in cases where it does not exist in negligence.

[3] To incorporate the rule in *Rylands v. Fletcher* into the law of negligence by judicial decision would be a far reaching step going beyond previous developments of the common law by this Court. Incorporating the rule in *Rylands v. Fletcher* into the law of negligence would require squeezing an established principle of strict liability out of the common law so that the law of negligence can control the field. In an age where the escape of fire, oil, gases, chemicals and radioactive materials have often caused widespread damage, it is not clear why the common law should now abandon the rule of strict liability in *Rylands v. Fletcher* for the indeterminacy of the action for negligence. Proximity, remoteness, reasonable care and breach of duty the benchmarks of negligence law are not formulae for exactness. Much more evidence, analysis and argument than put before the Court in the case is needed before a decision can be made as to whether the rule in *Rylands v. Fletcher* should be banished from the books.

[4] The use of welding equipment on an industrial site for the purpose of construction work is not a non-natural use of the land. The decision of the full Court that there was a 'non-natural' use based on the manner of performance of the work is erroneous. Therefore the action against BPA founded on the rule in *Rylands v. Fletcher* must fail.

[5] BPA did not engage an incompetent contractor. It did not have knowledge that the contractor proposed to execute the work in an unsafe manner. Applying the reasoning in *Stoneman v. Lyons* the action founded on negligence against BPA has to fail and the appeal must be allowed.

[Appeal dismissed with costs].

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Turberville v. Stampe [1697] 1 Ld Raym 264 [91 ER 1072]
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Musgrove v. Pandelis [1919] 2 KB 43; [1919] 1 KB 314
Spicer v. Smee [1946] 1 All ER 489
Wise Bros. Pty. Ltd. v. Commissioner for Railways (NSW) [1947] 75 CLR 59

Hargrave v. Goldman [1963] 110 CLR 40
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Mason v. Levy Auto Parts of England Ltd. [1967] 2 QB 530
H & N Emanuel Ltd. v. Greater London Council [1971] 2 All ER 835
Jones v. Festiniog Railway Co. [1868] LR 3 QB 733
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Whinfield v. Lands Purchase & Management Board of Victoria and State Rivers & Water Supply Commission of Victoria [1914] 18 CLR 606
Hazelwood v. Webber [1934] 52 CLR 268
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Read v. J. Lyons & Co. Ltd. [1945] KB 216, 227, 235 / [1947] AC 156
Rickards v. Lothian [1913] 16 CLR 387; [1913] AC 263
Eastern and South African Telegraph Co. v. Cape Town Tramways Cos. [1902] AC 381
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Cambridge Water Co. v. Eastern Countries Leather Plc. [1994] 2 WLR 53
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Benning v. Wong [1969] 122 CLR 249
Webber v. Hazelwood [1934] 34 SR (NSW) 155
Heaven v. Pender [1883] 11 QBD 503
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Jaensch v. Coffey [1984] 155 CLR 549
Sutherland Shire Council v. Heyman [1985] 157 CLR 424
Stevens v. Brodribb Sawmilling Co. Pty. Ltd. [1986] 160 CLR 16
San Sebastian Pty Ltd. v. The Minister [1986] 162 CLR 340
Cook v. Cook [1986] 162 CLR 376
Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] AC 465
Haseldine v. C.A. Daw & Son Ltd. [1941] 2 KB 343
Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. [1921] 2 AC 465
Foster v. Warblington Urban Council [1906] 1 KB 648
Jones v. Llanrwst Urban Council [1911] 1 Ch. 393
Hoare & Co. v. McAlpine [1923] 1 Ch. 167
Rigby v. Chief Constable of Northamptonshire [1985] 1 WLR 1242
Northwestern Utilities Ltd. v. London Guarantee and Accident Co. [1936] AC 108
Thompson v. Bankstown Corporation [1953] 87 CLR 619
Perry v. Kendrick's Transport Ltd. [1956] 1 WLR 85
Carstairs v. Taylor [1871] LR 6 Ex 217
Ross v. Fedden [1872] LR 7 QB 661
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Commissioner for Railways v. Quinlan [1964] AC 1054
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Kondis v. State Transport Authority [1984] 154 CLR 672
Hughes v. Percival [1883] 8 App Cas 443
The Commonwealth v. Introvigne [1982] 150 CLR 258
Black v. Christchurch Finance Co. [1894] AC 48
McInnes v. Wardle [1931] 45 CLR 548
Wyong Shire Council v. Shirt [1980] 146 CLR 40
Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle [1940] 64 CLR 514
West v. Bristol Tramways Company [1908] 2 KB 14
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Noble v. Harrison [1926] 2 KB 332
Leaky v. National Trust [1980] QB 485
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New Zealand Forest Products Ltd. v. O'Sullivan [1974] 2 NZLR 80
Eastern Asia Navigation Co. Ltd. v. Fremantle Harbour Trust Commissioners [1951] 83 CLR 353
Colonial Mutual Life Assurance Society Ltd. v. Producers and Citizens Co-operative Assurance Co. of Australia Ltd. [1931] 46 CLR 41
Dalton v. Angus [1881] 6 App Cas 740
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Stoneman v. Lyons [1975] 133 CLR 550
Bower v. Peate [1876] 1 QBD 321
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Matania v. National Provincial Bank Ltd. [1936] 2 All ER 633
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Sochacki v. Sas [1947] 1 All ER 344
Smith v. Badenoch [1970] SASR 9
British Celanese v. A.H. Hunt Ltd. [1969] 1 WLR 959
Bayliss v. Lea [1959] 61 SR (NSW) 247
Overseas Tankship (UK) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound) [1961] AC 388
State Government Insurance Commission v. Trigwell [1979] 142 CLR 617

Legislation referred to:

Careless Use of Fire Act 1912, s. 2 (NSW)
Fires Prevention (Metropolis) Act 1774, s. 86
Marine Act 1976 (Tas.)
Supreme Court Civil Procedure Act 1932, s. 11(15) (Tas.)

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The Law of Torts, Fleming, 8th Edn., [1992] at 349-350
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The Myth of Absolute Liability, Winfield, (1926) 42 Law Quarterly Review 37

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Tort, Winfield and Jolowicz, 9th Edn., (1971) at 388, 390; Rogers, 13th Edn., (1989) at 443; Winfield, 8th Edn., (1967) at 438
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For the appellant-Barker & Worsley
For the respondent-Dobson Mitchell & Allport

JUDGMENT

Mason CJ, Deane, Dawson, Toohey and Gaudron JJ:

The respondent, General Jones Pty. Limited ("General"), suffered damage when a very large quantity of frozen vegetables which it owned was ruined by a fire which destroyed a building owned by the appellant, the Burnie Port Authority ("the Authority"), at Burnie in Tasmania. The frozen vegetables were stored in three cold rooms in the building. General occupied the cold rooms and an office area pursuant to an agreement with the Authority. The rest of the building, including the area between the ceiling and roof, remained under the occupation of the Authority. At the time of the fire, work was being carried out to extend to building and install further cold storage facilities in the extension. The original building in which the vegetables were stored was known as "Stage 1" and the uncompleted extension was known as "Stage 2".

The Authority had not engaged a head contractor in relation to the work involved in erecting and equipping Stage 2. Through employees, it effected part of that work itself, including clearance of the site, the pouring of the concrete foundations and the design of the steel work. Other work involved in Stage 2, including the erection of the steel frame and the installation of electrical and refrigeration equipment, was entrusted to independent contractors. One of those independent contractors was Wildridge & Sinclair Pty. Limited ("W & S").

The work contracted to W & S included the installation of the additional refrigeration in Stage 2. It involved considerable welding and the use of a large quantity of expand polystyrene (EPS) which is an insulating material. While EPS contains retardant chemicals to inhibit ignition, it can be set alight if brought into sustained contact with a flame or burning substance. Once ignited, the substance dissolves into a liquid fire which burns with extraordinary ferocity, at a rate which increases in geometric progression. The EPS to be used by W & S was marketed under the commercial name of "Isolite" and was contained in approximately thirty cardboard cartons which were, to the knowledge of the Authority, stacked together in an area or "void" under the roof of stage 2 ("the roof void") in close vicinity to where W. & S. would, again to the knowledge of the Authority, be carrying out extensive welding activities. Obviously, it was essential that care be exercised to ensure that sparks or molten liquid from those welding activities did not ignite the cardboard of one of the stacked containers. If that happened, the likelihood was that the Isolite in that container would ignite with the result that the whole of the Isolite would become an uncontrollable conflagration.

It is common ground that, at relevant times, the Authority was itself in occupation of Stage 2, including the roof void. The Authority took no steps to avoid the risk of conflagration which unguarded welding activities in the vicinity of the cartons of Isolite involved. On the findings of the learned trial Judge, employees of W & S carried out the welding activities in such a negligent fashion that sparks or molten metal fell upon one or more of the cartons containing the Isolite. The cardboard was set alight and the Isolite itself commenced to burn fiercely. The conflagration spread from the roof void to the whole of Stage 2 and most of Stage 1, including those parts of the original building containing the cold rooms occupied by General. Within minutes of the commencement of the fire, the whole complex was engulfed in flames.

In the course, General sued both the Authority and W & S in the Supreme Court of Tasmania. At first instance, the proceedings were complicated by cross-claims and third party claims among the defendants and an additional party, Olympic General Products Pty. Limited

("Olympic"), which had been the supplier of the Isolite. The learned trial Judge (Neasey J.) found that General was entitled to judgment against the Authority and W & S for the damage (to be assessed) which it had sustained by reason of the loss of its frozen vegetables. His Honour held that W & S's liability resulted from the application of the ordinary principles of the law of negligence ("ordinary negligence") and from the application of a special rule relating to an occupier's liability for damage caused by the escape of fire from his or her premises (the "ignis suus rule"). His Honour held that the Authority's liability resulted from the application of the ignis suus rule. As between the Authority and W & S., his Honour found that the Authority was, by reason of W & S's negligence, entitled to be indemnified by W & S in respect of any damages which it paid to General. The Authority's and W & S's third party claims against Olympic were dismissed.

The authority appealed to the Full Court from the trial Judge's order that judgment be entered in General's favour against it. The Full Court (Cox, Crawford and Zeeman JJ.) affirmed the Authority's liability to General and ordered that the appeal be dismissed. However, the members of the Full Court concluded that the basis of the Authority's liability to General lay not in any special rule relating only to the escape of fire but in a more general common law rule, the rule in *Rylands v. Fletcher* [1866] LR 1 Ex 265; affd [1868] LR 3 HL 330, relating to the liability of an occupier for damage caused by the escape of dangerous substances introduced to his or her premised. The present appeal is by the authority from the judgment and order of the Full Court.

In this Court, General has argued that it is entitled to maintain the judgment in its favour on each of three distinct grounds, namely, (i) the *ignis suus* principle; (ii) *Rylands v. Fletcher* liability; and (iii) ordinary (or *Donoghue v. Stevenson* [1932] AC 562) negligence. A fourth ground, ordinary nuisance, was raised in General's written outline of argument but was abandoned in the course of oral argument. For its part, the Authority, while denying any liability to General, has not challenged the findings in the Courts below to the effect that General sustained substantial damage caused by the spread of fire from premises occupied by the Authority (Stage 2 and the residue of Stage 1) to the premises occupied by General (the cold rooms) and that the fire was caused by negligence on the part of the Authority's independent contractor in carrying out unguarded welding operations on the premises occupied by the Authority in the close vicinity of the stacked cardboard cartons of Isolite. It is in the context of those now undisputed findings of fact that the applicable principles of law must be identified.

Ignis suus

The special common law rule relating to the liability of an occupier for damage caused by the escape of fire from his or her premises can be traced back to the 1401 Year Book case of *Beaulieu v. Finglam* [1401] YB 2 Hen. IV, f. 8, pl. 6; translated in Fifoot, **History and Sources of the Common Law: Tort and Contract,** (1949) at 166-167. That special rule had its basis in the ancient custom of England (see *Beaulieu v. Finglam* [1401] YB 2 Hen. iv, f. 18, pl. 6 and *Turberville v. Stampe* [1697] 1 Ld Raym 264 [91 ER 1072]: "common custom of the realm"; *Filliter v. Phippard* [1847] 11 QB 347 at 354 [116 ER 506 at 509]: the "ancient law, or rather custom of England".). It did not extend to a fire caused by an act of God or a stranger which was not, for the purposes of the rule, the occupier's *("suus")* fire. While the old action on the case for damage caused by the spread of fire involved an allegation of "negligenter", the preferable view is that that was "a pleader's adverb" which originally did no more than reflect the perception that it was the strict duty of the occupier of premises to prevent the spread of "his fire" from those premises (see, generally, **Comyns's Digest,** 4th Edn., (1800), Vol. 1 at 284-285).

The *ignis suus* rule was progressively modified in England in the 18th century by legislation (see, in particular, Acts of 1707 (6 Anne c. 31), 1711 (10 Anne c. 14) and the Fires Prevention (Metropolis) Act 1774 (14 Geo. III c. 78)) which ultimately operated indefinitely (the operation of the relevant section of the 1707 Act was initially limited to three years duration, but was made perpetual by the 1711 Act) to exclude the liability of "any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall ... accidentally begin" (Fires Prevention (Metropolis) Act 1774, s. 86). The English legislation was subsequently adopted by a number of

Australian legislatures (see, generally, Higgins, **Elements of Torts in Australia,** (1970) at 209; Fleming, **The Law of Torts,** 8th Edn., (1992) at 349-350). A settled, and perhaps surprising, course of judicial decisions in England, and later in this country, has established that, contrary to the views of (amongst other) Blackstone's **Commentaries on the Laws of England,** 10th Edn., (1787), Bk 1 at 431 and Bacon's **A New Abridgment of the Law,** 5th Edn., (1789), Vol. 1 at 85 (see also, *Viscount Canterbury v. Attorney-General* [1843] 1 Ph 306 at 315-319 per Lord Lyndhurst LC [41 ER 648 at 652-653]), any fire caused (or allowed to spread) through negligence is not, for the purposes of that legislation, an accidental one (see *Filliter v. Phippard* [1847] 11 QB at 355-358 (116 ER at 510); *Musgrove v. Pandelis* [1919] 2 KB 43 at 47; *Spicer v. Smee* [1946] 1 All ER 489 at 495; *Wise Bros. Pty. Ltd. v. Commissioner for Railways (NSW)* [1947] 75 CLR 59 at 67; *Hargrave v. Goldman* [1963] 110 CLR 40 at 58; *Goldman v. Hargrave* [1967] 1 AC 645 at 665). The result is that the rule survived, and arguably still survives (see, e.g. *Balfour v. Barty-King* [1957] 1 QB 496; *Mason v. Levy Auto Parts of England Ltd.* [1967] 2 QB 530 at 540-541; *H & N Emanuel Ltd. v. Greater London Council* [1971] 2 All ER 835 at 838-839. But note, for the view that it has been absorbed by more general principles, *Jones v. Festiniog Railway Co.* [1868] LR 3 QB 733 at 736, 738; *Powell v. Fall* [1880] 5 QBD 597 at first instance at 599 per Mellor J.; affd by Bramwell, Baggallay and Thesiger L.JJ in the Court of Appeal; *Gunter v. James* [1908] 24 TLR 868; *Mansel v. Webb* [1918] 88 LJKB 323 at 324-325), in England as a special rule imposing liability upon an occupier of premises for the escape of a fir on the premises caused by the negligence of the occupier or his or her invites or licensee *(Balfour v. Barty-King* [1957] 1 QB at 504-505; *H & N Emanuel Ltd. v. Greater London Council* [1971] 2 All ER at 838). If the *ignis suus* rule, as qualified by the Tasmanian equivalent of the English legislation (see Supreme Court Civil Procedure Act 1932, s. 11(15) (Tas.)), survives in the law of Tasmania as a special rule applicable to damage caused by fire, it will, as Neasey J,. held at first instance, suffice to impose liability upon the authority for the damage sustained by General in the present case since it would render the authority liable for the damage caused by the spread from the Authority's premises of a fire caused by the negligence of the authority's independent contractor.

It is perhaps arguable that, in a context where the "rigorous" (see, e.g. *Bugge v. Brown* [1919] 26 CLR 110 at 115; *Hargrave v. Goldman* [1963] 110 CLR at 57, 58), special *ignis suus* rule was explained as being one of English custom, neither the rule itself nor the 18th century statutes which modified it were ever transported to this continent as part of our inherited law (see *Batchelor v. Smith* [1879] 5 VLR L 176 at 178; *Whinfield v. Lands Purchase & Management Board of Victoria and State Rivers & Water Supply Commission of Victoria* [1914] 18 CLR 606 at 616; but cf., e.g. *Hazelwood v. Webber* [1934] 52 CLR 268 at 275; *Hargrave v. Goldman* [1963] 110 CLR at 58). On the other hand, the whole of the common law of England can be truly said to be "the legal expression of custom" *(Williams v. Owen* [1955] 1 WLR 1293 at 1297. See also **Comyns's Digest,** *op. cit.* at 285; *Read v. J. Lyons & Co. Ltd.* [1945] KB 216 at 228 per Scott LJ; [1947] AC 156 at 175 per Lord Macmillan). It is, however, unnecessary to pursue that question. The cases in this Court establish that, under the common law of this fire escaping from his premises has been absorbed into, and qualified by, more general rules or principles. We turn to demonstrate that that is so. The difference of opinion in the Courts below about the effect of the decisions of this Court makes it necessary that the cases be examined in greater detail than might otherwise be appropriate.

In *Whinfield v. Lands Purchase & Management Board of Victoria and State Rivers & Water Supply Commission of Victoria* [1914] 18 CLR 606, a case concerned with damage caused by the escape of fire, Griffith CJ *ibid.* at 614-615, 616; Powers J. concurring at 621-622 and Isaacs J. *ibid.* at 617 rejected the proposition that, under the common law of this country, the occupier's liability falls to be determined by reference to some special rule restricted to the escape of fire as distinct from the more general principles defining liability for the escape of any dangerous substance. Indeed, in the course of his judgment *ibid.* at 616, Griffith CJ commented:

> It would be a shocking thing to lay down as a rule of law that in a country like Australia, where probably hundreds, if not thousands, of men travelling on foot in sparsely settled districts ask every day for permission to camp for the night on private property, the owner by granting such poor

hospitality becomes responsible for the lighting of a fire by the wayfarer to boil his 'billy' or keep himself warm.

Notwithstanding the 18th century legislation, the old *ignis suus* rule would, as has been seen (see above, fn. (12)), have imposed liability on such an owner for damage caused by the spread of fire as a result of the negligence of such a licensee. Issac J. rejected the proposition that "fire being always dangerous unless confined, a person who introduces it upon his own land is, apart from the effect of inevitable accident or the wrongful interposition of a third person, liable for all damages caused to another by its escape" [1914] 18 CLR at 617. His Honour added that "(t)he decision in *Rickards v. Lothian* [1913] 16 CLR 387; [1913] AC 263 and also the judgment in *Eastern and South African Telegraph Co. v. Cape Town Tramways Cos.* [1902] AC 381 there cited, particularly when read together, places the law very definitely on a much more reasonable foundation." Those two cases were concerned with *Rylands v. Fletcher* liability - *Rickards v. Lothian* with liability for escape of water; the *Cape Town Tramways* case with liability for escape of electric current. Isaacs J., in express reliance upon "their explanation of the doctrine of *Rylands v. Fletcher*" [1914] 18 CLR at 620, held that liability for the escape of fire had not been established by Mr Whinfield.

The next case in the Court to which specific reference should be made is *Hazelwood v. Webber* [1934] 52 CLR 268. In that case, fire had escaped from the defendant's land to the plaintiff's land where it caused damage. The Court held that the defendant was liable pursuant to the general principles governing liability for the escape of dangerous substances. In the course of their judgment, Gavan Duffy CJ, Rich, Dixon and McTiernan JJ. expressly referred *ibid.* at 274-276 to the old common law rule relating to the excape of fire and to the Fires Prevention (Metropolis) Act 1774. Their Honours made clear *ibid.* at 275, 277-278 that the old special rule had been absorbed into the general principles relating to the escape of dangerous substances which had been laid down in *Rylands v. Fletcher* and developed in *Rickards v. Lothian.* Starke J., the fifth member of the Court, expressed a corresponding view *ibid.* at 280:

> The use of fire involved at common law the strictest responsibility, and decisions in modern times have brought that responsibility into line with what Blackburn J. *(Jones v. Festiniog Railway Co.* [1868] LR 3 QB at 736) called 'the general rule of common law ... given in *Fletcher v. Rylands*' ...; 'when a man brings or uses a thing of a dangerous nature on his own land, he must keep it in at his own peril; and is liable for the consequences if it escapes and does injury to his neighbour' *ibid.* Exceptions from this liability have been recognized, and the critical question is whether the appellant has established that the present case is within any such exception.

Wise Bros Pty. Ltd. v. Commissioner for Railways (NSW) [1947] 75 CLR 59 was another case to reach the Court in which the occupier of land was sued for damage caused by the escape of fire. The plaintiff's reliance upon a special *ignis suus* rule was seen by the Court *ibid.* at 67, 70, 73-74 as answered by *Hazelwood v. Webber.* The Court treated as applicable *ibid.* at 67-68, 70, 73-74 the general principles determining liability for the escape of dangerous substances introduced or collected upon land as explained and developed in *Rylands v. Fletcher* [1866] LR 1 Ex 265; [1868] LR 3 HL 330, *Rickards v. Lothian* [1913] 16 CLR 387; [1913] AC 263, *Hazelwood v. Webber* [1934] 52 CLR 268 and *Read v. J. Lyons & Co. Ltd.* [1947] AC 156. It was held that the defendant was not liable under those principles for the reason that its use of the land was not a non-natural use. The result was that the case was, by reason of the wrongful exclusion of evidence, remitted for a new trial restricted to two counts alleging ordinary negligence.

In *Hargrave v. Goldman* [1963] 110 CLR at 56-58, Windeyer J. traced the origins of what he described *ibid.* at 58 as "the rigorous rule of the mediaeval common modifications in England and Western Australia. His Honour concluded that, even if it were accepted that those statutory modifications did not apply in this case, the Court would not be "thrown back" to that rigorous rule since the Court had "held that the old rules have been absorbed into the principle of *Rylands v. Fletcher;* and that the strict liability of the common law is subject to the qualifications of and exceptions to that principle" *ibid.* In support of that conclusion, his Honour cited *Bugge v. Brown* [1919] 26 CLR at 114-115 and *Hazelwood v. Webber* [1934] 52 CLR 268. The reference to *Bugge v. Brown* was to pages of the Commonwealth Law Reports in which Isaacs J. had recorded that,

in the course of argument of that case, the Court had ruled against a proposition "that the owner of land is liable for damage caused by any fire there in fact kindled or kept by his servant whether negligently or not, and whether or not in the course of his employment". The various reports of the argument in *Bugge v. Brown* do not refer to that ruling (see [1919] 26 CLR at 111-114; [1919] VLR 264 at 266-268; [1919] 25 Argus LR 103 at 103-104). Isaacs J.'s terse explanation of it in his judgment was that "the rigorous proposition so contended for cannot now be maintained". It is possible that, as Zeeman J. suggested in his judgment in the present case, the ruling was based more on the perceived effect of the 18th century legislation than on the perception of *Rylands v. Fletcher*:". On balance, however, it seems to us that, in the context of Isaacs J.'s judgment in the earlier case of *Whinfield v. Lands Purchase & Management Board of Victoria* [1914] 18 CLR 606, Windeyer J's reliance on *Bugge v. Brown* was well founded. In that regard, it is relevant to note Isaacs J's reference, in the course of argument in *Bugge v. Brown* [1919] 26 CLR at 112, to *Batchelor v. Smith* [1879] 5 VLR L 176 and the subsequent reference in his judgment [1919] 26 CLR at 129 to *Musgrove v. Pandelis* [1919] 1 KB 314. In the former case [1879] 5 VLR L at 178, 179, it was held by the Full Court of the Supreme Court of Victoria that neither the *ignis suus* rule nor the 18th century English statutes had ever applied in Victoria. In the latter [1919] 1 KB at 317. This approach was affirmed by the Court of Appeal in *Musgrove v. Pandelis* [1919] 2 KB 43. See also *Jones v. Festiniog Railway Co.* [1868] LR 3 QB at 738 per Lush J., the trial Judge, Lush J., had indicated that, in the context of the Fires Prevention (Metropolis) Act 1774, the defendant's liability for damage caused by the escape of fire from his premises flowed from the application of the "principle" of *Rylands v. Fletcher* rather than from any special rule relating to the escape of fire. However, regardless of the justification for Windeyer J.'s reliance on *Bugge v. Brown*, one thing is clear. That is that his Honour's conclusion that the cases in the Court establish that the old special rule relating to liability for escape of fire has been "absorbed into the principle of *Rylands v. Fletcher*" was fully justified by the judgments in *Hazelwood v. Webber* and the other cases to which reference has already been made in this judgment.

Nor is there any reason in principle or policy for the preservation in this country of the special ignis suus rule formulated as appropriate to urban circumstances in medieval England. For one thing, that special rule was formulated before either the establishment of more general principles dealing with the escape of dangerous substances or the development of the modern law of negligence. For another, though fire is an exceptional hazard in Australia, contemporary conditions in this country have no real similarity to urban conditions in medieval England where the escape of domestic fire rivalled plague and was as a cause of general catastrophe (see, e.g. *Filliter v. Phippard* [1847] 11 QB at 354 [116 ER at 509]; *Balfour v. Barty-King* [1957] 1 QB at 502. See also Bell, **The Great fire of London in 1666,** [1920] at 1, 17, 296-298; Fifoot, *op. cit.* at 155; definition of "curfew" in the **Oxford English Dictionary,** 2nd Edn., (1989), Vol. 4 at 142).

It follows that any liability of the Authority to General must be founded otherwise than on some special rule dealing only with liability for the escape of fire.

The 18th Century English Statutes

As has been seen, it is settled by judicial decision that the 18th century English statutes (and their Australian equivalents) excluding the liability of any person for the spread of a fire which "accidentally" began on "his" premises were inapplicable to a fire caused by negligence. It has also been held that those statutes, where still in force, have no application to exclude *Rylands v. Fletcher* liability *Musgrove v. Pandelis* [1919] 1 KB 314; [1919] 2 KB 43 or liability in nuisance *Spicer v. Smee* [1946] 1 All ER at 495. While that judicial confinement of the scope of the English statutes, and of any Australian equivalents, should be accepted as settled law, the reasoning which was invoked in support of it is open to legitimate criticism (see, e.g. Ogus, "**Vagaries in Liability for the Escape of fire**", [1969] 27 Cambridge Law Journal 104 at 112-116, 118-119). A preferable rationalization is that those statutes were directed solely to providing protection from liability under the *ignis suus* rule (see, e.g. Stallybrass, **"Dangerous Things and the**

Non-Natural User of Land", [1929] 3 Cambridge Law Journal 376 at 397; but cf. *Williams v. Owen* [1955] 1 WLR at 1298) and accordingly must be construed as not concerned with providing protection for liability under more general principles. On that approach, the effect of our conclusion that no special *ignis suus* rule survives in our common law is that those English statutes and their Australian equivalents can be generally treated by the Courts of this country as no longer applicable. In any event, the effect of the confinement by past decisions of the scope of those statutes is that they are inapplicable to General's claim to the extent that it is based on the rule in *Rylands v. Fletcher* or ordinary negligence.

The "true rule" in Rylands v. Fletcher

In *Fletcher v. Rylands* [1866] LR 1 Ex at 279-280, a strong Court of Exchequer Chamber Willes, Blackburn, Keating, Mellor, Montague Smith and Lush JJ., in a judgment delivered by Blackburn J., identified what was described as "the true rule of law":

> the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and , if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the excape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient.

Notwithstanding the many accolades which have been, and continue to be, lavished on Blackburn J's judgment (see, e.g., Wigmore, **"Responsibility for Tortious Acts: Its History",** [1894] 7 Harvard Law Review 315, 383, 441 at 454: "the master-mind of Mr Justice Blackburn"; Newark, **"The Boundaries of Nuisance",** (1949) 65 Law Quarterly Review 480 at 487: "his great judgment"; Salmond and Heuston on the **Law of Torts,** 20th Edn., (1992) at 314: "always been recognised as one of the masterpieces of the Law Reports"), that brief exposition of "the true rule of law" is largely bereft of current authority or validity if it be viewed, as it ordinarily is, as a statement of a comprehensive rule (see, e.g., *Jones v. Festiniog Railway Co.* [1868] LR 3 QB at 736 per Blackburn J.: "the general rule of common law"). Indeed, it has been all but obliterated by subsequent judicial explanations and qualifications. Thus, the phrase "for his own purposes" has been largely discarded as a general qualification. While it occasionally re-emerges in general statements of the rule, its current role would seem to be confined to that of a bolster of the requirement of "natural use" (see below) in cases involving the use of premises for public or patriotic purposes (see, e.g., *Read v. J. Lyons & Co. Ltd.* [1947] AC at 169-170). The possessive "his" before "lands", apparently used to denote ownership, must be expanded to the stage where it would include any person in control. On the other hand, it is arguable that it should be confined to exclude the non-occupying owner. The word "lands", used in conjunction with "escapes", is too narrow. The precise extent to which it should be extended is, however, a matter of complete uncertainty. The conjunctive "and" before "collects" and "keeps" should be read as the disjunctive "or". The phrase "anything likely to do mischief if it escapes" has, in a process commenced by Blackburn J, himself *(Jones v. Festiniog Railway Co.* [1868] LR 3 QB at 736: "a thing of a dangerous nature".), largely been supplanted by the word "dangerous". The reference to "all the damage which is the natural consequence of its escape" is too wide (see below). The statement that it was "unnecessary to inquire what excuse would be sufficient" has inevitably been overlaid by decisions identifying such excuses. It does, however, serve the continued purpose of highlighting the fact that the rule enunciated by Blackburn J. was, as his Lordship made clear, one of *"prima facie"* liability.

The Court of Exchequer Chamber in *Fletcher v. Rylands* itself recognized that the above statement of the "true rule of law" is too wide, even as an exposition of a *prima facie* rule, unless it is accompanied by some overriding qualifications. Thus, Blackburn J. commented *Fletcher v. Rylands* [1866] LR 1 Ex at 280 that:

> It seems but reasonable and just that the neighbour, who has brought something on his own property which **was not naturally there,** harmless to others so long as it is confined to his own property, **but which he knows to be michievous if it gets on his neighbour's** should be obliged to make good

> the damage which ensues if he does not succeed in confining it to his own property. (emphasis added)

Again, however, Blackburn J's statement of those qualifications has long been overlaid and effectively displaced. The qualification "which was not naturally there' was adverted to with apparent approval by Lord Cairns LC in the House of Lords in *Rylands v. Fletcher* [1868] LR 3 HL at 340 but converted *ibid*. at 338-339, without explanation and perhaps inadvertently, into a quite different (see below) requirement of "non-natural use". The qualification "which he knows to be mischievous" has been, in the context of private nuisance and the development of the modern law of negligence, transformed from an apparent requirement of actual knowledge into a requirement closely resembling, or perhaps even amounting to, (see *Cambridge Water Co. v. Eastern Counties Leather Plc.* [1994] 2 WLR 53 at 79; and note Holmes view that foreseeability of the likelihood of harm is the unifying element of tortious liability: see O.W. Holmes, **The Common Law** (1882) Lectures iii & iv; see also *Read v. J. Lyons & Co. Ltd*. [1945] KB at 227-235) a requirement of foreseeability of relevant damage in the event of the escape of the dangerous substance.

Unfortunately, the subsequent judicial alterations and qualifications of Blackburn J.'s statement of the "true rule" have introduced and exacerbated uncertainties about its content and application. Thus, while it is clear that the requirements of "for his own purposes", "brings on", "his" (in the sense of ownership) and "lands" are all too narrowly identified, there remains room for legitimate dispute about precisely what, if anything, should be substituted for each of them. In addition, it is unclear whether another requirement, that of "escape". refers to escape from the defendant's "land" or other "premises" or merely escape from control. The critical obscurity resides, however, in the twin requirements of "dangerous substances" and "non-natural use". If, as *Rylands v. Fletcher* itself decided, water can be a dangerous substance for the purposes of the rule, it is difficult to identify anything which, accumulated either in sufficient quantity or under sufficient pressure, might not be a dangerous substance. In that regard, it would seem that Blackburn J.'s own exclusion of things "naturally there" was intended to be understood as referring to things "naturally there" in their "mischievous" state since the report of proceedings in the Court of Exchequer discloses that, notwithstanding Blackburn J.'s repeated use of the words "brings on" and "brought on" (see [1866] LR 1 Ex at 279, 280, 282), the water in the defendants' reservoir in *Fletcher v. Rylands* had come "to their land naturally" ([1865] 3 H & C 774 at 786 [159 ER 737 at 742]; but cf. *Cambridge Water Co. v. Eastern Counties Leather Plc.* [1994] 2 WLR at 82).

Lord Cairns LC's requirement of "non-natural use" may have originally been intended to echo Blackburn J's "not naturally there" and to refer to a use of land other than in its natural state. If so, that narrow interpretation of the requirement did not survive. The most influential of the subsequent explanation of the requirement of "non-natural use" has proved to be that formulated by the Privy Council, in a judgment delivered by Lord Moulton on an appeal from this Court, in *Rickards v. Lothian* [1913] 16 CLR at 400-401; [1913] AC at 280:

> It is not every use to which land is put that brings into play (the principle in *Rylands v. Fletcher*). It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.

That formulation, which was to some extent based on the judgment of Wright J. in *Blake v. Woolf* [1898] 2 QB 426 at 428: "using ... land in the ordinary way"; "an ordinary and reasonable user of ... premises", has been adopted both in this Court (see, e.g., *Whinfield v. Lands Purchase & Management Board of Victoria* [1914] 18 CLR at 618; *Hazelwood v. Webber* [1934] 52 CLR at 278; *Torette House Pty. Ltd. v. Berkman* [1940] 62 CLR 637 at 646, 656; *Benning v. Wong* [1969] 122 CLR 249 at 302) and in the House of Lords (see, e.g. *Read v. J. Lyons & Co. Ltd*. [1947] AC at 169, 176, 187). The descriptions which it uses - "special" and "not ... ordinary" - seem to focus, like Lord Cairns LC's "non-natural", on the nature of the use.

a However, other cases have made clear that, in determining whether a use satisfies the "non-natural", "special" or "not ordinary" description, regard may be had to the manner as well as to the nature of the use. Increasingly, *Rylands v. Fletcher* liability has come to depend on all the circumstances surrounding the introduction, production, retention or accumulation of the relevant substance. That being so, the presence of reasonable care of the absence of negligence in the manner of dealing with a substance or carrying out an activity may intrude as a relevant factor in determining whether the use of land is a "special' and "not ordinary" one. Certainly, b the factors which are relevant in determining whether a defendant has been guilty of negligence in a case involving damage caused by the escape from premises of a dangerous substance will almost inevitably also be relevant on the question whether the defendant's use of those premises was a "natural" one. As Lord Porter said in *Read v. J. Lyons & Co. Ltd. ibid.* at 176:

> each (i.e. the question whether something 'is dangerous' and whether a 'use' is a 'non-natural' one) seems to be a question of fact subject to ruling of the Judge as to whether the particular object can c be dangerous or the particular use can be non-natural, and in deciding this question I think that all the circumstances of the time and place and practice of mankind must be taken into consideration so that what might be regarded as dangerous or non-natural may vary according to those circumstances.

Those comments are not inconsistent with the statement of Gavan Duffy CJ, Rich, Dixon and McTiernan JJ. in *Hazelwood v. Webber* [1934] 52 CLR at 278 that the question of non-natural use "is not one to be decided by a jury on each occasion as a question of fact". Indeed, the sentences d in their Honours' judgment which immediately precede that statement tend to emphasise the importance of the particular factual circumstance *ibid.*:

> Now in applying this doctrine to the use of fire in the course of agriculture, the benefit obtained by the farmer who succeeds in using it with safety to himself and the frequency of its use by other farmers are not the only consideration. The degree of hazard to others involved in its use, the extensiveness of the damage it is likely to do and the difficulty of actually controlling it are even more important e factors. These depend upon climate, the character of the country and the natural conditions.

Obviously, the question whether there has been a non-natural use in a particular case is a mixed question of fact and law which involves both ascertainment and assessment of relevant facts and identification of the content of the legal concept of a "non-natural" use. Indeed, it is one of those questions which may be misleadingly converted into a pure question of fact or a pure question of law by an unexpressed assumption that either the precise content of applicable legal concepts f or the relevant facts and factual conclusions are manifest and certain. Be that as it may, and regardless of whether one emphasises the legal or factual aspect of the question of non-natural use, the introduction of the descriptions "special" and "not ordinary" as alternatives to "non-natural", without any identification of a standard or norm, goes a long way towards depriving the requirement of "non-natural use" of objective content (cf. *Webber v. Hazelwood* [1934] 34 SR (NSW) 155, at 159 per Jordan CJ: "The adjectives which have been used in this connection do not of themselves supply a solution).

g In *Read v. J. Lyons & Co. Ltd.,* Lord Porter referred ([1947] AC at 176. See also, *Cambridge Water Co. v. Eastern Counties Leather Plc.* [1994] 2 WLR at 82-83) to a possible future need "to lay down principles" for determining whether the twin requirements of "something which is dangerous" and "non-natural use" have been satisfied. We are unable to extract any such principles from the decided cases. Indeed, if the rule in *Rylands v. Fletcher* is regarded as constituting a discrete area of the law of torts, it seems to us that the effect of past cases is that no such principles exist. h In the absence of such principles, those twin requirements compound the other difficulties about the content of the "rule" to such an extent that there is quite unacceptable uncertainty about the circumstances which give rise to its so-called "strict liability". The result is that the practical application of the rule in a case involving damage caused by the escape of a substance is likely to degenerate into an essentially unprincipled and *ad hoc* subjective determination of whether the particular facts of the case fall within undefined notions of what is "special" or "not ordinary".

i If the problems of the rule in *Rylands v. Fletcher* were confined to the uncertainties of its content and application, it would be necessary for the Courts to continue their so far spectacularly

unsatisfactory efforts to resolve them. The problems are not, however, so confined. In the more than a century and a quarter that has passed since its formulation by Blackburn J., the rule has been progressively weakened and confined from within and the area of its effective operation, in the sense of the area in which it applies to impose liability where it would not otherwise exist, has been progressively diminished by increasing assault from without. From within, the broadening of Blackburn J's exception of things "naturally there", which would seem to have been used in the sense of without human intervention, into an exception of "natural", "ordinary" or not "special" use has reduced the scope of the rule to the stage where a majority of the House of Lords in *Read v. J. Lyons & Co. Ltd.* [1947] AC at 169-170, 174, 186-187 could indicate a view that, in the circumstances of that case, the use of land for the obviously dangerous activity of manufacturing high-explosive shells may have been outside the scope of the rule. From without, ordinary negligence has progressively assumed dominion in the general territory of tortious liability for unintended physical damage, including the area in which the rule in *Rylands v. Fletcher* once held sway. Ultimately, as will be seen, the resolution of this case largely turns upon a consideration of the present relationship between ordinary negligence and the rule in *Rylands v. Fletcher*. A starting point of that consideration is an understanding of the role played by the conception of proximity in the development of the unified modern law of negligence.

Negligence

Fletcher v. Rylands was decided by the Court of Exchequer Chamber some seventeen years before Lord Esher (then Brett M.R.), in *Heaven v. Pender* [1883] 11 QBD 503, formulated the general - or "larger" (ibid. at 509) - proposition which constituted the first step in the perception of a coherent jurisprudence of common law negligence. Almost half a century later, the House of Lords in *Donoghue v. Stevenson* [1932] AC 562 effectively completed the process. The judgment of Brett M.R. in *Heaven v. Pender* and the speech of Lord Atkin in *Donoghue v. Stevenson* were both concerned with identifying a general unifying proposition which explained why a duty to take care to avoid injury to another had been recognized in past cases in the Courts. Essentially, the methodology of both was identical: the identification of a general proposition which selected "recognised cases suggest, and which is therefore, to be deduced from them" ([1883] 11 QBD at 509; and see *Donoghue v. Stevenson* [1932] AC at 580) and the confirmation of the validity of the proposition by ascertaining that no "obvious case can be stated in which the liability must be admitted to exist, and which yet is not within this proposition" ([1883] 11 QBD at 509-510; and see *Donoghue v. Stevenson* [1932] AC at 583-584).

The "larger proposition" formulated by Brett M.R. in *Heaven v. Pender* was one of foreseeability [1883] 11 QBD at 509:

> whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

It was, however, expressly rejected by the majority of the English Court of Appeal (Cotton and Bowen LJJ) in that case for the reason that "there are many cases in which the principle was impliedly negatived" *(ibid.* at 516). In *Donoghue v. Stevenson*, Lord Atkin emphatically endorsed that rejection of it as an unqualified proposition ([1932] AC at 580 ("demonstrably too wide"), 582). On the other hand, he concluded *ibid.* at 582 that "the judgment of Lord Esher (in *Heaven v. Pender*) expresses the law of England" if the requirement of a relationship of proximity, partly derived from the judgments of Lord Esher M.R. himself and A.L. Smith LJ in *Le Lievre v. Gould* [1893] 1 QB 491 at 497 per Lord Esher MR: physically "near", at 504 per A.L. Smith LJ: physical "proximity" were recognised as a general overriding control - "this necessary qualification" ([1932] AC at 582; and see, generally, *Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad"* [1976] 136 CLR 529 at 574-575; *Jaensch v. Coffey* [1984] 155 CLR 549 at 583-586; *Sutherland Shire Council v. Heyman* [1985] 157 CLR 424 at 495-496; *Stevens v. Brodribb Sawmilling Co. Pty. Ltd.* [1986] 160 CLR 16 at 52; *Cook v. Cook* [1986] 162 CLR 376 at 382), - of the test of foreseeability.

The "general conception" of a relationship of proximity was identified ([1932] AC at 580) by Lord Atkin as the "element common to the cases where (liability in negligence) is found to exist" and as the basis of the duty of care which is common to all such cases. It has been stressed and developed in judgments in recent cases in the Court (see, in particular, *Jaensch v. Coffey* [1984] 155 CLR at 553-554, 583-586; *Sutherland Shire Council v. Heyman* [1985] 157 CLR at 441, 461-462, 471, 495-498; *Stevens v. Brodribb Sawmilling Co. Pty. Ltd.* ([1986] 160 CLR at 30, 49-53; *San Sebastian Pty. Ltd. v. The Minister* [1986] 162 CLR 340 at 355; *Cook v. Cook* [1986] 162 CLR at 381-382). As Deane J. pointed out in *Stevens v. Brodribb Sawmilling Co. Pty. Ltd.* ([1986] 160 CLR at 53; and see, generally, *Cook v. Cook* [1986] 162 CLR at 382 per Mason, Wilson, Deane and Dawson JJ.), that common element of a relationship of proximity "remains the general conceptual determinant and the unifying theme of the categories of case is which the common law of negligence recognizes the existences of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another". Without it, the tort of negligence would be reduced to a miscellany of disparate categories among which reasoning by the legal processes of induction and deduction would rest on questionable foundations since the validity of such reasoning essentially depends upon the assumption of underlying unity or consistency.

It is true that the requirement of proximity was neither formulated by Lord Atkin nor propounded and developed in cases in this Court as a logical definition or complete criterion which could be directly applied as part of a syllogism of formal logic to the particular circumstances of a particular case (see *Donoghue v. Stevenson* [1932] AC at 580; and, generally, *Stevens v. Brodribb Sawmilling Co. Pty. Ltd.* [1986] 160 CLR at 51-53). As a general conception deduced from decided cases, its practical utility lies essentially in understanding and identifying the categories of case in which a duty of care arises under the common law of negligence rather than as a test for determining whether the circumstances of a particular case bring it within such a category, either established or developing (see, generally, *Jaensch v. Coffey* [1984] 155 CLR at 585; *Stevens v. Broadribb Sawmilling Co. Pty. Ltd.* [1986] 160 CLR at 53; *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465, at 524-525). That is, however, the basic function performed by general principles or conception in the ascertainment and development of the common law. More than half a century ago, Scott LJ *(Haseldine v. C.A. Daw & Son Ltd.* [1941] 2 KB 343, at 362-363), drew attention to the "curious repetition of history" involved in the fact that "Lord Atkin's exposition of principle (had) met with the same unfair criticism, although less in degree, as that which Lord Esher's exposition (of principle in *Heaven v. Pender* had) evoked". Scott LJ correctly pointed out *ibid.* that criticism based on "the error ... of assuming that Lord Atkin was intending to formulate a complete criterion, almost like a definition in the prolegomena to a new theory of philosophy" failed to appreciate "the real value of attempts to get at legal principle". The point can be illustrated by contrasting the specific test of "non-natural", "special" or "not ordinary" use under the rule in *Rylands v. Fletcher* with the general conception or principle of proximity of relationship in the law of negligence. The "non-natural" use test under the rule in *Rylands v. Fletcher* was not deduced from past cases. As has been said, it was an unexplained, and conceivably inadvertent, judicial transformation of Blackburn J.'s qualification "not naturally there". More important, notwithstanding its lack of clear objective content, it has been propounded merely as a specific test to be directly applied, as part of a complex complete criterion of liability, to the particular circumstances of a particular case. Far from representing a unifying principle and a general conceptual explanation and determinant of different categories of case, it has, in combination with the associated (and often confused (see *Stallybrass, op. cit.* at 395-396) requirement of dangerousness, become a source of disparity within the individual category. Thus, the introduction to or retention on land of trees, water, gas, electricity, fire and high-explosives (see generally, *ibid.* at 382-385; Fleming, *op. cit.* at 339), amongst other things, have all been seen, as a result of the application of the test to the particular circumstances, as both attracting and not attracting the operation of the rule in *Rylands v. Rletcher* (see, e.g., *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co.* [1921] 2 AC 465 at 471; but cf. *Read v. J. Lyons* & Co. Ltd. [1947] AC at 169-170, 174, 186-187). Indeed, the test of "non-natural use" has probably done more than anything else to vindicate Sir Frederick Pollock's identification, almost a century ago, of *Rylands v. Fletcher* as one of those authorities "that are followed only in the letter, and become slowly but surely choked and

crippled by (judicially imposed) exceptions" **(The Law of Fraud, Misrepresentation and Mistake in British India,** (1894) at 54).

Ordinary negligence and the rule in Rylands v. Fletcher

Much has been written in the past about precisely where, among the old forms of action, one should locate the source or sources of the rule in *Rylands v. Fletcher* (see, e.g., Wigmore, *op. cit.* at 452-456; Winfield, **"The Myth of Absolute Liability",** (1926) 42 Law Quarterly Review 37; Winfield, **"Nuisance as a Tort",** (1931) 4 Cambridge Law Journal 189; Newark, *op. cit.;* Prosser, **Selected Topics on the Law of Torts,** (1982), c.3; Salmond and Heuston on the **Law of Torts,** *op. cit.* at 315-316, 317-319). However, the subsequent emergence of a coherent law of negligence to dominate the territory of tortious liability for unintentional injury to the person or property of another has deprived the question of much of its practical significance. Regardless of the parental claims of nuisance (see, e.g., *Rickards v. Lothian* [1913] 16 CLR at 395-396; [1913] AC at 275; *Musgrove v. Pandelis* [1919] 2 KB at 47, 49, 51; *Read v. J. Lyons & Co. Ltd.* [1947] AC at 173, 182-183; *Benning v. Wong* [1969] 122 CLR at 296-297, 319-320; *Cambridge Water Co. v. Eastern Counties Leather Plc.* [1994] 2 WLR 53) or even trespass (see, e.g., *Foster v. Warblington Urban Council* [1906] 1 KB 648 at 672 per Stirling LJ; *Jones v. Llanrwst Urban Council* [1911] 1 Ch. 393 at 402-403 per Parker J.; *Hoare & Co. v. McAlpine* [1923] 1 Ch. 167 at 175 per Astbury J.; *Read v. J. Lyons & Co. Ltd.* [1947] AC at 166 per Viscount Simon; but cf. *Rigby v. Chief Constable of Northamptonshire* [1985] 1 WLR 1242 at 1355 per Taylor J.), the rule has been increasingly qualified and adjusted to reflect basic aspects of the law of ordinary negligence. As has been said, Blackburn J.'s qualification: "which he know to be mischievous", has been refined into an objective test which is (at the least) a close equivalent of foreseeability of damage of the relevant kind. As has been seen, the absence of reasonable care or the presence of "negligence" has itself intruded as a factor in determining whether, for the purposes of the rule, the use of land is "non-natural", "special" or "not ordinary". Moreover, the various defences of an occupier or premises against *Rylands v. Fletcher* "strict liability" closely correspond with grounds of denial of fault liability under the law of negligence. Thus, "consent" and "default of the plaintiff" are analogous to voluntary assumption of risk and contributory negligence. Again, while Blackburn J. recognized them as possible excuses ([1866] LR 1 Ex at 280), defences of "consequence of vis major, or the act of God", in the context of damage caused by the "escape" of the dangerous substance, are more attuned to the notion of fault liability than that of strict liability but cf. *Benning v. Wong* [1969] 122 CLR at 298-299 per Windeyer J. Where the defence of statutory authority is available, the issue will commonly become one of negligence simpliciter (see, e.g., *Northwestern Utilities Ltd. v. London Guarantee and Accident Co.* [1936] AC 108 at 119-121; *Thompson v. Bankstown Corporation* [1953] 87 CLR 619 at 630, 634, 637, 644-645). Clearly, there is validity in Professor Fleming's comment **(The Law of Torts,** 8th Edn., (1992) at 343) that "(t)he aggregate effect of these exceptions makes it doubtful whether there is much left of the rationale of strict liability as originally contemplated in 1866."

Similarly, former restrictions upon the damages recoverable under the rule in *Rylands v. Fletcher* have, at least in this country, been relaxed towards correspondence with the rules controlling recoverable damages in an action in ordinary negligence. In *Benning v. Wong* [1969] 122 CLR at 319-320, Windeyer J. correctly saw that relaxation of a wider movement in the law of torts:

> Developments in the law of tort are towards a liability for personal harm done to persons who are neighbours in Lord Atkin's sense. They need not be persons having an interest in land in the neighbourhood. The movement of the common law is away from any preoccupation it may once have had with the protection of rights in land. ... I think this Court should ... treat the doctrine of *Rylands v. Fletcher* as having become in this matter emancipated from restrictions its origin in or relationship with nuisance might impose.

It would seem that, in England, recoverable damages under the rule in *Rylands v. Fletcher* may still be confined to compensation for damage to property sustained by the owner or occupier of neighbouring land "on to" which the dangerous thing "passes" and "does damage" (see, e.g., *Read v. J. Lyons & Co. Ltd.* [1945] KB at 238; [1947] AC at 173, 174; but cf. *Perry v. Kendrick's*

Transport Ltd. [1956] 1 WLR 85 at 92). In this country, such damages are not so confined but extend to personal injury or damage to property sustained outside the relevant premises by persons having no relationship to neighbouring land apart from being on it (see, e.g., *Thompson v. Bankstown Corporation* [1953] 87 CLR at 644; *Benning v. Wong* [1969] 122 CLR at 274-275, 277, 319-320). As Windeyer J. said in *Benning v. Wong* [1969] 122 CLR at 320:

> A plaintiff can I think recover under it for personal injuries, or harm to his personal effects if, at the time when the escaping thing came upon him, he was in a place where he was lawfully entitled to be as a licensee, or as a member of the public, such as on a highway or in a public park.

Windeyer J.'s qualification "where he was lawfully entitled to be" was intended, as his Honour made clear *ibid.*, to leave open rather than to exclude the position of a trespasser. Otherwise, the main control of recoverable damages under the rule is the requirement that the damage be related to the qualities or circumstances which bring the case within the rule (see *Fletcher v. Rylands* [1866] LR 1 Ex at 279: "damage which is the natural consequence of [the] escape"; Fleming, *op. cit.* at 329). In the context of the other requirements of the rule. In particular, Blackburn J's "which he knows to be mischievous" as developed by subsequent authority, that control closely corresponds with ordinary negligence's insistence that actionable damage be foreseeable *(Benning v. Wong* [1969] 122 CLR at 320; see also Salmond and Heuston on the **Law of Torts,** *op. cit.* at 324-325; Todd et al., **The Law of Torts in New Zealand,** (1991) at 471; but cf. Clerk & Lindsell on **Torts,** 15th Edn., (1982) at 1205).

The rule in *Rylands v. Fletcher* has never been seen as exclusively governing the liability of an occupier of land in respect of injury caused by the excape of a dangerous substance (see, e.g., *Carstairs v. Taylor* [1871] LR 6 Ex 217; *Ross v. Fedden* [1872] LR 7 QB 661; *Anderson v. Oppenheimer* [1880] 5 QBD 602; *Rickards v. Lothian* [1913] 16 CLR 387; [1913] AC 263; *Torette House Pty. Ltd. v. Berkman* [1940] 62 CLR 637; *Hargrave v. Goldman* [1963] 110 CLR 40). In that, the rule can be contrasted with the old special rules defining the liability of an occupier of premises for damage sustained by a visitor on the premises which were traditionally seen as excluding the application of more general principles (see, e.g., Commissioner for *Railways v. Quinlan* [1964] AC 1054). The result of the development of the modern law of negligence has been that ordinary negligence has encompassed and overlain the territory in which the rule in *Rylands v. Fletcer* operates. Any case in which an owner or occupier brings into premises or collects or keeps a "dangerous substance" in the course of a "non-natural use" of the land will inevitably fall within a category of case in which a relationship of proximity under ordinary negligence principles will exist between owner or occupier and someone whose person or property is at risk of physical injury or damage in the event of the "escape" of the substance. Indeed, so much was made clear in *Donoghue v. Stevenson* itself where Lord Atkin referred ([1932] AC at 595-596; see also, at 611-612 per Lord Macmillan) to "the cases dealing with duties where the thing is dangerous", as illustrating "the general principle" which he had formulated.

In *Commissioner for Railways (NSW) v. Cardy* [1960] 104 CLR 274 at 291, Fullagar J. commented that *Donoghue v. Stevenson* "in a sense reoriented the whole law of negligence, and left perhaps few cases which went to the root of that subject and which were not liable to be re-examined and tested in the light of it". That approach was reflected in judgments in this Court in a series of five cases between 1953 and 1963. *Thompson v. Bankstown Corporation* [1953] 87 CLR 619; *Rich v. Commissioner for Railways (NSW)* [1959] 101 CLR 135; *Commissioner for Railways (NSW) v. Cardy* [1960] 104 CLR 274; *Commissioner for Railways (NSW) v. Anderson* [1961] 105 CLR 42; *Voli v. Inglewood Shire Council* [1963] 110 CLR 4 , supporting the conclusion that the old special rules concerning the duties of occupiers to invitees, licensees and trespassers were "part of" and "ultimately subservient" to the ordinary principles of the law of negligence with the result that the "duty to a trespasser is a duty to a person who may also be a neighbour in the sense in which Lord Atkin used the word" *(Rich v. Commissioner for Railways (NSW)* [1959] 101 CLR at 159; *Voli v. Inglewood Shire Council* [1963] 110 CLR at 89; and see, generally, *Hackshaw v. Shaw* [1984] 155 CLR at 646-653). That conclusion was denied by the Privy Council in *Commissioner for Railways v. Quinlan* [1964] AC 1054 at 1081, where their Lordships commented that they could not "find any line of reasoning by which the limited duty that an

occupier owes to a tresspasser (under the old special rules could) co-exist with the wider general duty of care appropriate to the *Donoghue v. Stevenson* formula", It is, however, now fully reinstated in the common law of this country by *Australian Safeway Stores Pty. Ltd. v. Zaluzana* [1987] 162 CLR 479 at 484-488 per Mason, Wilson, Deane and Dawson JJ. where it was held that the old inflexible rules defining the duty of an occupier of land to an invitee, a licensee and a trespasser have been absorbed by the principles of ordinary negligence. Inevitably, the question arises whether the special rule in *Rylands v. Fletcher* has similarly been so absorbed.

Some of the considerations favouring an affirmative answer to that question have already been identified: the fact that, unlike the old rule regulating an occupier's liability to a visitor, the rule in *Rylands v. Fletcher* has never been seen as an exclusive determinant of liability with the result that ordinary negligence has overlain the whole area in which the rule operate; the uncertainties about the content of the rule, including the quite unacceptable uncertainty of the requirement of "non-natural", "special" or "not ordinary" use; the difficulties in its application; and the reluctance of the Courts to accept and apply it. To them must be added the fact that, like the old special rules defining the liability of an occupier to invitees, licensees and trespassers, some of the distinctions upon which the rule is based are unreasonably arbitrary. Thus, for example, the decision in *Read v. J. Lyons & Co. Ltd.* would indicate that liability under the rule to two persons in otherwise identical circumstances who were injured by an explosion when entering premises would be different if, at the time of the explosion, one person had paused and allowed the other to cross the threshold. Indeed, it would seem at least arguable that liability in the case of a single plaintiff who was so injured could be confined by reference to which of the directly injured parts of his or her body remained physically outside the premises at the instant of the explosion.

The main argument supporting the preservation of the rule in *Rylands v. Fletcher* as a discrete or independent area of the law of torts is the argument that the rule cannot be accommodated within the principles of ordinary negligence without denying liability in cases where it would otherwise exist. In considering that argument, it is appropriate to accept a broad or expansive view of the kind of substance or activity which may come within the reach of the rule. Accordingly we shall assume that the rule extends to the introduction or retention of any dangerous substance or the carrying out of any dangerous activity upon or within property under the occupation or control of the defendant.

Inevitably, the past adjustments and qualifications of the rule in *Rylands v. Fletcher* to reflect aspects of the law of ordinary negligence have greatly reduced the likelihood that *Rylands v. Fletcher* liability will exist in a case where liability would not exist under the principles of negligence. Thus, the editors of the last five editions of Winfield and Jolowicz on **Tort** (see, eg., Jolowicz, Ellis Lewis and Harris, 9th Edn., (1971) at 388, 390; Rogers, 13th Edn., (1989) at 443). have expressed the view that, putting to one side the factual situations in which a plaintiff will succeed equally well either under the rule or in nuisance, "[w]e have virtually reached the position where a defendant will not be considered liable when he would not be liable according to the ordinary principles of negligence." A similar view has been expressed by other distinguished academic writers. Nonetheless, there remains the perception of an underlying antithesis between the rule in *Rylands v. Fletcher* and the principles of negligence. Liability under the rule is still theoretically seen as "strict liability" in the sense that it can arise without personal fault whereas liability in negligence is fault liability, that is to say, liability flowing from breach of a duty owed by the defendant to the plaintiff. The judicial transformation of Blackburn J.'s requirement of "not naturally there" into a test of "special" and "not ordinary" use and the expanded defences to a *Rylands v. Fletcher* claim have, as has been seen, deprived that perception of underlying antithesis of some of its theoretical validity and most of its practical significance. However, as Professor Thayer indicated in a posthumous article published in the Harvard Law Review in 1916 **("Liability without Fault",** (1916) 29 Harvard Law Review at 801), the final answer to any argument based on that perceived theoretical contrast lies in ordinary negligence's concepts of a "non-delegable duty and a variable standard of care.

The "non-delegable" duty

As was pointed out in the majority judgment in *Cook v. Cook* [1986] 162 CLR at 382, "(t)he more detailed definition of the objective standard of care (under the ordinary law of negligence) for the purposes of a particular category of case must necessarily depend upon the identification of the relationship of proximity which is the touchstone and control of the relevant category." It has long been recognized that there are certain categories of cases in which a duty to take reasonable care to avoid a foreseeable risk of injury to another will not be discharged merely by the employment of a qualified and ostensibly competent independent contractor. In those categories of cases, the nature of the relationship of proximity gives rise to a duty of care of a special and "more stringent" kind, namely a "duty to ensure that reasonable care is taken" (see *Kondis v. State Transport Authority* [1984] 154 CLR 672 at 686). Put differently, the requirement of reasonable care in those categories of cases extends to seeing that care is taken. One of the classic statements of the scope of such a duty of care remains that of Lord Blackburn in *Hughes v. Percival* [1883] 8 App Cas 443 at 446:

> that duty went as far as to require (the defendant) to see that reasonable skill and care were exercised in those operations ... If such a duty was cast upon the defendant he could not get rid of responsibility by delegating the performance of it to a third person. He was at liberty to employ such a third person to fulfil the duty which the law cast on himself ... but the defendant still remained subject to that duty, and liable for the consequences if it was not fulfilled.

In *Kondis v. State Transport Authority* [1984] 154 CLR at 679-687; and see, also, *Stevens v. Brodribb Sawmilling Co. Pty. Ltd.* [1986] 160 CLR at 44 per Wilson and Dawson JJ., in a judgment with which Deane, J. and Dawson J. agreed, Mason J. identified some of the principal categories of cases in which the duty to take reasonable care under the ordinary law of negligence is non-delegable in that sense: adjoining owners of land in relation to work threatening support or common walls; master and servant in relation to a safe system of work; hospital and patient; school authority and principal; and (arguably), occupier and invitee. In most, though conceivably not all, of such categories of cases, the common "element in the relationship between the parties which generates (the) special responsibility or duty to see that care is taken" is that "the person on whom (the duty) is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised" *(Kondis v. State Transport Authority* [1984] 154 CLR at 687; see, also, *Stevens v. Brodribb Sawmilling Co. Pty. Ltd.* [1986] 160 CLR at 31, 44-46). It will be convenient to refer to that common element as "the central element of control". Viewed from the perspective of the person to whom the duty is owed, the relationship of proximity giving rise to the non-delegable duty of care in such cases is marked by special dependence or vulnerability on the part of that person *(The Commonwealth v. Introvigne* [1982] 150 CLR 258 at 271 per Mason J.).

The relationship of proximity which exists, for the purposes of ordinary negligence, between a plaintiff and a defendant in circumstances which would *prima facie* attract the rule in *Rylands v. Fletcher* is characterized by such a central element of control and by such special dependence and vulnerability. One party to that relationship is a person who is in control of premises and who has taken advantage of that control to introduce thereon or to retain therein a dangerous substance or to undertake thereon a dangerous activity or to allow another person to do one of those things. The other party to that relationship is a person, outside the premises and without control over what occurs therein, whose person or property is thereby exposed to a foreseeable risk of danger ("which he knows to be mischievous if it gets on his neighbour's [property]": *Fletcher v. Rylands* [1866] LR 1 Ex at 280; see above). In such a case, the person outside the premises is obviously in a position of special vulnerability and dependence. He or she is specially vulnerable to danger if reasonable precautions are not taken in relation to what is done on the control of the premises to ensure that such reasonable precautions are in fact taken. Commonly, he or she will have neither the right nor the opportunity to exercise control over, or even to have foreknowledge of, what is done or allowed by the other party within the premises. Conversely,

the person who introduces (or allows another to introduce) the dangerous substance or undertakes (or allows another to undertake) the dangerous activity on premises which he or she controls is "so placed in relation to (the other) person or his property as to assume a particular responsibility for his or its safety". *a*

It follows that the relationship of proximity which exists in the category of cases into which *Rylands v. Fletcher* circumstances fall contains the central element of control which generates, in other categories of case, a special "personal" or "non-delegable" duty of care under the ordinary law of negligence. Reasoning by analogy suggest, but does not compel, a conclusion that that common element gives rise to such a duty of care in the first-mentioned category of case. There are considerations of fairness which support that case. There are considerations of fairness which support that conclusion, namely, that it is the person in control who has authorized or allowed the situation of foreseeable potential danger to be imposed on the other person by authorizing or allowing the dangerous use of the premises and who is likely to be in a position to insist upon the exercise of reasonable care. It is also a supported by considerations of utility: "the practical advantage of being conveniently workable, of supplying a spur to effective care in the choice of contractors, and in pointing the victim to a defendant who is easily discoverable and probably financially responsible" (Thayer, *op. cit.* at 809). The weight of authority confirms that the duty in that category of case is a non-delegable one. *b* *c*

Thus, in *Black v. Christchurch Finance Co.* [1894] AC 48, the plaintiff sustained damage when a fire, which had been negligently lit by an independent contractor on the defendant's land, spread to the plaintiff's land. It was assumed by the Privy Council *ibid.* at 56 that, in lighting the fire at the time he did, the independent contractor was acting in "violation of the terms of the contract" between the defendant and himself. Nonetheless, it was held that the defendant was liable. Their Lordships found it unnecessary to address the question whether the case fell within the rule in *Rylands v. Fletcher* and was therefore one of "strict liability". Indeed, neither the report of argument nor the judgment contains any reference to *Rylands v. Fletcher* or cases dealing with the escape of dangerous substances. Nor did their Lordships invoke any special rule relating to escape of fire. The basis of their Lordships' decision was that, in the context of the dangerous activity on its land, the defendant had been under a non-delegable duty "to use all reasonable precautions" of the kind identified in *Hughes v. Percival.* In that regard, using language appropriate to ordinary negligence but not to strict liability, their Lordships said *ibid.* at 54: *d* *e*

> The lighting of a fire on open bush land, where it may readily spread to adjoining property and cause serious damage is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all **reasonable precautions** to prevent the fire extending to his neighbour's property *(sic utere tuo ut alienum non laedas).* And if he authorizes another to act for him he is bound, not only to stipulate that such **precautions** shall be taken, but also to see that these are observed, otherwise he will be responsible for the consequences. See *Hughes v. Percival* and authorities there cited. (emphasis added) *f*

Black v. Christchurch Finance Co. was followed by this Court in *McInnes v. Wadle* [1931] 45 CLR 548. There again, the plaintiff's property had been damaged when fire spread to his land from the defendant's land. The fire had been lit to burn bracken on the defendant's land by an independent contractor whom the defendant had engaged to fumigate rabbits on the property and to do some other work. It was found by the trial Judge that, notwithstanding that the burning of scrub at that time of the year was an unlawful and dangerous activity, the defendant knew, or ought reasonably to have known, that fire would be employed if, as was likely, its use was found necessary or expedient in the opinion of the independent contractor (see *ibid.* at 551 but none that Gavan Duffy CJ and Starke J. expressed the view (at 550) that it would be irrelevant if the independent contractor had not complied with or had abused the "conditions of authority"). *Rylands v. Fletcher* was not mentioned in argument or in any of the judgments. Gavan Duffy CJ and Starke J. (in a joint judgment) and Evatt J. and McTiernan J. (in individual judgments) all concluded that the defendant was liable on the ground that, in the circumstances of the case, he owed a non-delegable duty of care, of the kind which had been held to exist in *Hughes v. Percival* and *Black v. Christchurch Finance Co.*, which required him to ensure that *g* *h* *i*

the independent contractor exercised "**reasonable** care" *ibid.* at 552 per Evatt J. (emphasis added) or took **"reasonable** precautions" *ibid.* at 550 per Gavan Duffy CJ and Starke J.: "all reasonable precautions" and 556 per McTiernan J.: "every reasonable precaution" (emphasis again added). The other member of the Court, Dixon J., also referred to the "duty of an occupier **to take care** that his land is so used and the operations carried out upon it are so managed that his neighbours are not exposed to injury by exceptional dangers" (emphasis added) *ibid.* at 552; but note Dixon J's reference to *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co.* [1921] 2 AC 465. Again, in *Torette House Pty. Ltd. v. Berkman* [1940] 62 CLR at 655, Dixon J. would seem to have accepted that dangerous use of land will give rise to such a personal or non-delegble duty of care on the part of the occupier under the principles of ordinary negligence. In that case, the independent contractor had not been employed by the defendant in the defendant's capacity of occupier of the premises from which water had escaped. He had been employed, as Dixon J pointed out *ibid.* "to do some work at the fittings of the shop further down the street". In concluding that, in the circumstances, the defendant was not liable under general principles for the negligence of his independent contractor, his Honour commented *ibid.*:

> But the case cannot be treated as one where an occupier allows an independent contractor so to use or deal with his premises that they become a source of harm to his neighbour.

The degree of care

Where a duty of care arises under the ordinary law of negligence, the standard of care exacted is that which is reasonable in the circumstances. It has been emphasised in many cases that the degree of care under that standard necessary varies with the risk involved and that the risk involved includes both the magnitude of the risk of an accident happening and the seriousness of the potential damage if an accident should occur (see, e.g., *Thompson v. Bankstown Corporation* [1953] 87 CLR at 645; *Wyong Shire Council v. Shirt* [1980] 146 CLR 40 at 47-48). Even where a dangerous substance or a dangerous activity of a kind which might attract the rule in *Rylands v. Fletcher* is involved, the standards of care remains "that which is reasonable in the circumstances, that which a reasonably prudent man would exercise in the circumstances" *(Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle* [1940] 64 CLR 514 at 523). In the case of such substances or activities, however, a reasonably prudent person would exercise a higher degree of care. Indeed, depending upon the magnitude of the danger, the standard of "reasonable care" may involve "a degree of diligence so stringent as to amount practically to a guarantee of safety" *(Donoghue v. Stevenson* [1932] AC at 612 per Lord Macmillan; *Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle* [1940] 64 CLR at 523 per Starke J.; and generally, *Stevens v. Brodribb Sawmilling Co. Pty. Ltd.* [1986] 160 CLR at 30, 42).

Conclusion

Once it is appreciated that the special relationship of proximity which exists in circumstances which would attract the rule in *Rylands v. Fletcher* gives rise to a non-delegable duty of care and that the dangerousness of the substance or activity involved in such circumstances will heighten the degree of care which is reasonable, it becomes apparent, subject to one qualification, that the stage has been reached where it is highly unlikely that liability will not exist under the principles of ordinary negligence in any case where liability would exist under the rule in *Rylands v. Fletcher.* It is true that one can point to a few cases, of which the most important are probably the 1934 case of *Hazelwood v. Webber* [1934] 52 CLR 268 in this Court and the 1908 case of *West v. Bristol Tramways Company* [1908] 2 KB 14 in the English Court of appeal, in which *Rylands v. Fletcher* liability was held to exist notwithstanding a finding of, or to the effect of, no negligence by the defendant. However, close examination of those cases discloses that they lack validity as examples of circumstances where the application of the modern law of negligence and the rule in *Ryland v. Fletcher* would produce different results. In *Hazelwood v. Webber,* which was the last case in this Court in which a finding of liability was based on the rule in *Rylands v. Fletcher,* the defendant had failed to take the steps necessary to ensure that a fire which he had lit on his land in breach of s. 2 of the Careless Use of fire Act 1912 (NSW) (see *Webber v. Hazelwood* [1934] 34 SR (NSW) 155) in mid-summer did not revive and spread to his

neighbour's land. The trial jury had given a negative answer to the question whether the defendant had been negligent. That answer had, however, been in a context where the trial Judge had refused to give a direction that burning off in mid-summer was not a natural and proper use of the land *(ibid.* at 156). In this Court, where the propriety of the jury's answer negating negligence was not examined in the judgments, the basis of the finding of *Rylands v. Fletcher* liability was the conclusion that burning off in mid-summer in Australia was a non-natural, extraordinary, special and highly dangerous use of land (see [1934] 52 CLR at 278-279, 281). Once that conclusion is accepted, it is plain that the jury's finding of no negligence could not, under the modern law of negligence, be sustained in the absence of any direction about the non-delegable nature and onerous standard of the duty of care required in relation to such a user of land. Indeed, the judgment of the majority of the Court in *Hazelwood v. Webber (ibid.* at 279) actually quotes the Privy Council's statement of that onerous non-delegable duty in *Black v. Christchurch Finance Co.* [1894] AC at 54, but in support of the finding of *Rylands v. Fletcher* liability. In *Weast v. Bristol Tramways Company,* the jury's answers to a number of questions were treated by the Court of appeal as negating any negligence on the part of the defendant company. On that basis, it is difficult to understand the Court of Appeal's conclusion that *Rylands v. Fletcher* was applicable to a case involving the use of creosote-coated wood for paving parts of a road in circumstances where the denial of negligence presumably meant that the defendant company did not "know", and could not reasonably be expected to know, that the creosote component of creosote-treated timber was "mischievous if it gets on his neighbour's (land)" *(Rylands v. Fletcher* [1866] LR 1 Ex. at 280). Indeed, at least in this country, it is somewhat difficult to understand how creosote-treated timber could be seen as a "dangerous" substance for the purposes of the rule in *Rylands v. Fletcher.* Again, however, if the basis for *Rylands v. Fletcher* liability did exist and the treated timber was a "dangerous" substance which the defendant knew, or ought to have known, would cause damage if it "escaped", it would seem that a finding of negligence would be inevitable under the modern law of negligence.

The qualification mentioned in the preceding paragraph is that there may remain cases in which it is preferable to see a defendant's liability in a *Rylands v. Fletcher* situation as lying in nuisance (or even trespass) and not in negligence (see, e.g., *Northwestern Utilities Ltd. v. London Guarantee & Accident Co.* [1936] AC at 119; *Cambridge Water Co. v. Eastern Counties Leather Plc.* [1994] 2 WLR 53; and, generally, Newark, *op. cit).*It follows that the main consideration favouring preservation of the rule in *Rylands v. Fletcher,* namely, that the rule imposes liability in cases where it would not otherwise exist, lacks practical substance. In these circumstances, and subject only to the above-mentioned possible qualification in relation to liability in nuisance, the rule in *Rylands v. Fletcher,* with all its difficulties, uncertainties, qualifications and exceptions, should now be seen, for the purposes of the common law of this country, as absorbed by the principles of ordinary negligence. Under those principles, a person who takes advantage of his or her control of premises to introduce a dangerous substance, to carry on a dangerous activity, or to allow another to do one of those things, owes a duty of reasonable care to avoid a reasonably foreseeable risk of injury or damage to the person or property of another. In a case where the person or property of the other person is lawfully in a place outside the premises that duty of care both varies in degree according to the magnitude of the risk involved and extends to ensuring that such care is taken. It is unnecessary for the purposes of the present case to express a concluded view on the question whether the duty of care owed, in such circumstances, to a lawful visitor on the premises is likewise a non-delegable one. The ordinary processes of legal reasoning by analogy, induction and deduction would *prima facie* indicate that it is. Like Windeyer J. in *Benning v. Wong* (see above), we have added the qualifications "lawfully" and "lawful" to reserve the position of, rather than to exclude, the unlawful plaintiff.

The Present Case

The difference of opinion between the learned trial Judge and the members of the Full Court about whether the circumstances of the present case attracted the rule in *Rylands v. Fletcher* resulted from the fact that the trial Judge considered that the rule's requirement of "non-natural use" was not satisfied while the Full Court concluded that it was. That disagreement between

the trial Judge and the members of the Full Court is not surprising in the context of the "rough sea of contradictory authority" *(Smeaton v. Ilford Corporation* [1954] Ch 450 at 478 per Upjohn J.) in which one can find powerful support for both the proposition that the excape of the contents of an ordinary privy satisfies the requirements of the rule (see *Fletcher v. Rylands* [1866] LR 1 Ex at 279-280; and see, generally, *Smeaton v. Ilford Corporation* [1954] Ch at 466-479) and the proposition that the manufacture of high-explosives does not necessarily satisfy the requirement of "non-natural" use *(Read v. J. Lyons & Co. Ltd.* [1947] AC at 169-170, 174, 186-187). Fortunately, our conclusion that the rule in *Rylands v. Fletcher* has been absorbed by the principles of ordinary negligence makes it unnecessary to attempt to derive from the decided cases some basis in principle for answering the question whether the welding activities in the circumstances of the present case were or were not a "non-natural" or "special" use of the Authority's premises. The critical question for the purposes of applying the principles of ordinary negligence to the circumstances of the present case is whether the Authority took advantage of its occupation and control of the premises to allow its independent contractor to introduce or retain a dangerous substance or to engage in a dangerous activity on the premises. The starting point for answering that question must be a consideration of what relevantly constitutes a dangerous substance or activity.

In the context of the ordinary law of negligence, the character of "dangerous" is not confined to those classes of things, such as poison, a loaded gun or explosives, which are "inherently dangerous" or "dangerous in themselves". This point was made by Lord Atkin in *Donoghue v. Stevenson* [1932] AC at 595-596:

> I do not find it necessary to discuss at length the cases dealing with duties where the thing is dangerous, or, in the narrower category, belongs to a class of things which are dangerous in themselves. I regard the distinction as an unnatural one so far as it is used to serve as a logical differentiation by which to distinguish the existence or non-existence of a legal right. In this respect I agree with what was said by Scrutton LJ in *Hodge & Sons v. Anglo-American Oil Co.* [1922] 12 L1 L Rep 183 at 187, a case which was ultimately decided on a question of fact. 'Personally, I do not understand the difference between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but itself, as poison, and a thing not dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two; it is a wolf in sheep's clothing instead of an obvious wolf.' The nature of the thing may very well call for different degrees of care, and the person dealing with it may well contemplate persons as being within the sphere of his duty to take care who would not be sufficiently proximate with less dangerous goods; so that not only the degree of care but the range of persons to whom a duty is owed may be extended. But they all illustrate the general principles.

The fact that a particular substance or a particular activity can be seen to be "inherently" or "of itself" likely to do serious injury or cause serious damage will, of course, ordinarily make characterization as "dangerous" more readily apparent. That fact does not, however, provide a criterion of what is and what is not dangerous for the purpose of determining whether the duty of a person in occupation or control of premises to take care to avoid injury or damage outside the premises is or is not a delegable one. It suffices for that purpose that the combined effect of the magnitude of the foreseeable risk of an accident happening and the magnitude of the foreseeable potential injury or damage if an accident does occur is such that an ordinary person acting reasonably would consider it necessary to exercise special care or to take special precautions in relation to it.

Similarly, a substance or activity entrusted to an independent contractor or other agent may be relevantly dangerous notwithstanding that foreseeable injury or danger will arise only in the event of what is commonly described as "collateral" negligence. If X engages an independent contractor to separately move two chemicals, which will cause a major explosion if they come into contract with one another, into separate storage areas, there may be no real risk of injury or damage at all if the independent contractor does what he or she is engaged to do. The activity is, however, obviously fraught with danger unless special precautions are taken to ensure that the independent contractor does not, through "collateral" negligence, transport the two chemicals together and in a way which causes contact between them. As Professor Thayer correctly pointed out, *(op. cit.* at 810) "collateral" is used in this context as a "most conveniently question-begging adjective" which, so far as it points to a definite conception, does no more than

"indicate a distinction according to the definiteness of the danger inherent and visible in the nature of the undertaking".

In the present case, the particular qualities of EPS made the stacked cardboard containers of Isolite in the roof area of the Authority's premises a dangerous substance in the sense that, if one of the cardboard containers were accidentally set alight, an uncontrollable conflagration would almost inevitably result (cf. Lord Summer's description, in *Rainham chemical Works Ltd. v. Belvedere Fish Guano Co.* [1921] 2 AC at 479, of dinitrophenol as a "dangerous explosive" notwithstanding that "a hot flame is needed to explode it"). Clearly, the introduction of more than twenty of those cardboard containers called for special precautions to be taken to avoid any risk of that happening. *A fortiori,* the carrying out of welding activities in the premises within which the cardboard containers of Isolite were stacked was itself a dangerous activity in that it was reasonable foreseeably that, unless special precautions were taken, sparks or molten metal might fall upon one of the containers and set the cardboard alight.

As has been seen, the evidence established that the Authority (through one of its employees) was aware that the cardboard containers of Isolite were being stored in the roof area near where welding work was to be carried out by W & S. It is, however, unnecessary that that was so. It suffices for present purposes that the Authority engaged and authorized its independent contractor to carry out work within its premises which required both the introduction of such large quantities of EPS to the premises and the carrying out of extensive welding work within the premises. It has not been suggested that it was not reasonably foreseeable that the large quantities of EPS which W & S. was authorized and required by the Authority to use would be contained in a combustible container such as cardboard. To the contrary, the evidence established that the Isolite had been used in Stage 1 of the building and, as has been said, that an employee of the Authority actually saw the cardboard containers being raised into the roof of the premises. In these circumstances, the overall work which the independent contractor was engaged to carry out on the premises was a dangerous activity in that it involved a real and foreseeable risk of a serious conflagration unless special precautions were taken to avoid the risk of serious fire. It was obvious that, in the event of any serious fire on the premises, General's frozen vegetables would almost certainly be damaged or destroyed. In these circumstances, the Authority, as occupier of those parts of the premises into which it required and allowed the Isolite to be introduced and the welding work to be carried out, owed to General a duty of care which was non-delegable in the sense we have explained, that is to say, which extended to ensuring that its independent contractor took reasonable care to prevent the Isolite being set alight as a result of the welding activities. It is now common ground that W & S did not take such reasonable care.

It follows that the Authority was liable to General pursuant to the ordinary principles of negligence for the damage which General sustained. The appeal must be dismissed.

Brennan J:

The Burnie Port Authority ("BPA"), a statutory body incorporated under the Marine Act 1976 (Tas.), had a cold store building on its land at Burnie. It contained three cold rooms. General Jones Pty. Ltd. ("General Jones") occupied these cold rooms under licence from BPA, using them for the storage of frozen vegetables. BPA undertook an extension of the cold store building by adding two further rooms (rooms 4 and 5) to the eastern end of the building. This extension was known as Stage 2. The licence granted to General Jones contained a clause relating to the extension:

> It is hereby agreed that the Board may extend the cold store building and use in connection therewith the refrigeration equipment presently used for the purpose of the said premises.

BPA, acting as its own contractor, engaged Wildridge and Sinclair Pty. Ltd. ("WS") to install electrical and refrigeration services to the extension. This work involved welding and the lagging of pipes between the cold room extension and the refrigeration units. While this work was being carried out by employees of WS on 20 December 1979, a fire broke out and destroyed most of the cold store building.

a General Jones brought an action in the Supreme Court of Tasmania against BPA and WS claiming damages against each of them for the loss of vegetables and plant and consequential loss. Neasey J. entered judgment for the plaintiff against each of the defendants for damages to be assessed. An appeal to the Full Court of the Supreme Court of Tasmania was dismissed.

The cold store building in which the fire occurred was rectangular in shape. The walls and ceiling in each of the refrigerated rooms, including rooms 4 and 5, were made from panel of expanded
b polystyrene or EPS (an insulating material) between thin steel or aluminium sheets. Steel portal frames stood at approximately 8.3 m centres. The above-ceiling shape of the portals was an inverted V enclosing a "roof void" (as it was described) of approximately 3 m in height between the apex and the ceiling of the refrigerated rooms. The walls of the refrigerated rooms were attached to a light steel framework and the ceilings of the rooms were attached to chains hanging from the roof. The exterior of the building consisted of outer walls and a roof of asbestos cement sheeting. There were asbestos cement gables at either end of the roof void. There was a gap of
c approximately 1m around the perimeter of the ceiling which allowed the passage of air from outside the building across the top of the ceiling.

On the day before the fire, employees of WS moved into the roof void 20 to 30 large cardboard cartons containing blocks of EPS having the trade name "Isolite". The Isolite was to be used as lagging around the pipes that carried refrigerant between the refrigeration units and the cold rooms. The seat of the fire was in a stack of Isolite cartons about 2m high near the eastern end
d of the roof void.

It is difficult to set fire to Isolite; it tends to shrink away from a heat source to which it is exposed. Further, chemicals which act to retard the initial establishment of flame are often added in the manufacture of EPS. However, constant exposure of Isolite to a sufficient heat source (such as burning cartons) may lead to the Isolite catching fire. Once it is ignited, the Isolite is highly flammable (in layman's terms, it is about twice as flammable as soft wood) and fire retardants
e have little or no effect. A short time before the fire, an employee of WS was welding a metal plate in close proximity to the stack of cartons. About 10 to 15 minutes after he stopped welding, some flames were noticed at one corner of the stack of cartons. The alarm was raised and employees of WS tries to extinguish the flames. However, the fire took hold and spread rapidly, and when it became apparent that their efforts were inadequate, the employees fled and the fire quickly engulfed the building.

f Neasey J, found that, on the balance of probabilities, the fire was caused by the falling of sparks or particles of molten metal, which had been emitted from welding carried on by an employee of WS, onto the cardboard cartons of Isolite. The sparks or particles set fire to the cardboard and thus the Isolite was ignited. His Honour held that WS were liable in negligence to the respondent. He found that such negligence consisted, in substance, of carrying out welding operations without taking adequate precautions, such as moving the stack of cartons containing the Isolite beyond the range of the welding operations or covering the cartons to protect them from sparks
g and pieces of hot metal. The precautions were elementary. As his Honour found, "the employees of WS chose to store these cartons of Isolite, though there was no need and no good reason to do so, close to their intended welding site, where there would according to ordinary welding practice taught to every apprentice in the trade be danger of fire when the welding took place." His Honour also found that WS was negligent in failing to keep a watch around the site of the welding operations after the welding had finished, and in failing to ensure that adequate fire-
h fighting equipment was available to control or extinguish any fire. The findings of the trial Judge as to the negligence of WS in carrying out the welding operations were not challenged on appeal.

The present appeal concerns the liability of BPA to General Jones for damage resulting from the fire caused by the negligence of WS. WS was BPA's independent contractor, not its servant. Neasey J. held that BPA was liable to General Jones by reason of a proposition which he stated in these terms:

i > an occupier of land is liable for damage caused by the spread of fire from his land caused by the negligence of his independent contractor.

This proposition was supported by reference to a rule of ancient origin (the "ignis suus" of "his (or her) fire" rule) which found modern expression in the judgment of Lord Denning M.R. in *H & N Emanuel Ltd. v. Greater London Council* [1971] 2 All ER 835 at 838-839. General Jones has founded its claim against BPA on two other bases, each of which has rejected by Neasey J. He rejected General Jones's submission that BPA was liable under the rule in *Rylands v. Fletcher* [1866] LR 1 Ex 265; on appeal [1868] LR 3 HL 330 on the ground that welding was not a non-natural use of BPA's premises. He also rejected a submission that BPA was liable in negligence. Although BPA had failed to provide adequate fire-fighting equipment, his Honour held that the fire was so intense that fire-fighting equipment would have been of no avail. Accordingly, he held that BPA was not guilty of any effective negligence. To the extent of BPA's liability to General Jones, BPA was held to be entitled to an indemnity from WS. His Honour also held WS liable in negligence for the loss suffered by BPA.

In the Full Court, BPA successfully attacked the very existence of the tort of *ignis suus* under which Neasey J. had held BPA liable. A majority of the Full Court (Crawford and Zeeman JJ.) held that the tort of ignis suus had been absorbed by the rule in *Rylands v. Fletcher*. However, the Full Court held BPA liable under the rule in *Rylands v. Fletcher*, finding that it was a non-natural use of BPA's premises to weld in the roof void near the stacked cartons of Isolite. Referring to Neasey J's finding that the employees of WS had failed to take precautions elementary in the welding trade Zeeman J. said:

> The failure by WS's employee to take such precautions, leads me to the conclusion that the particular welding operations did not amount to a natural user of the land, but amounted to a non-natural user.

On appeal by BPA to this Court, it was submitted on behalf of General Jones that the facts found by Neasey J. supported the judgment it its favour on one or more of three bases: (i) the tort of *ignis suus;* (ii) the rule in *Rylands v. Fletcher;* (iii) the tort of negligence consisting, in this case, of a breach of a duty of care owed by BPA directly to General Jones. These were the bases which Bankes L.J. in *Musgrove v. Pandelis* [1919] 2 KB 43 at 46, 47 had identified as separate heads of liability for damage done by escape of fire originating on the defendant's land. In England, the three separate hands have been criticized (see the discussion by MacKenna J. in *Mason v. Levy Auto Parts of England Ltd.* [1967] 2 QB 530 at 540, 541) on the ground that the common law provided but a single head of liability, stated in terms derived from the ancient rule of *ignis suus.*

Ignis suus

The earliest expression of this tort appears in *Beaulieu v. Finglam* [1401] YB 2 Hen 4, f. 18, pl. 6; Fifoot, **History and Sources of the Common Law,** (1949) at 166-167 where Markham J. said:

> I shall answer to my neighbour for each person who enters my house by my leave or my knowledge, or is my guest through me or through my servant, if he does any act, as with a candle or aught else, whereby my neighbour's house is burnt. But if a man from outside my house and against my will starts a fire in the thatch of my house or elsewhere, whereby my house is burned and my neighbours' houses are burned as well, for this I shall not be held bound to them; for this cannot be said to be done by wrong on my part, but is against my will.

A later case, in 1697, was *Turberville v. Stampe* [1697] 1 Ld Raym 264 [91 ER 1072] where it was held that a person might be liable for the escape of fire from his field as he would be for the escape of fire from his house. In *Mason v. Levy Auto Parts of England Ltd.* [1967] 2 QB at 540 Mackenna J. stated the common law rule in broad terms:

> A person from whose land a fire escaped was held liable to his neighbours unless he could prove that it had started or spread by the act of a stranger or of God.

And in *Hazelwood v. Webber* [1934] 52 CLR 268 at 274-275 it was said that:

> the common law imposed upon the occupier of land, who used fire upon it, a *prima facie* liability which was independent of negligence for the harm suffered by his neighbour as a natural consequence of the escape of the fire.

The liability for escape of fire was qualified at first by an Act of 1707 6 Anne c. 31, s. 6 and then by The Fire Prevention (Metropolis) Act 1774 14 Geo. 3 c. 78, s. 86. In Tasmania, that provision is enacted by s. 11(15) of the Supreme Court Civil Procedure Act 1932 (Tas.), which provides:

> No action or process may be had, maintained, or prosecuted against a person on whose land a fire accidentally begins, and he shall not be required to make recompense for any damage suffered thereby, any law, usage, or custom to the contrary notwithstanding.

The legislation protects the defendant from liability in a case of fires which begin "accidentally", a term discussed by Lord Goddard CJ in *Balfour v. Barty-King* [1957] 1 QB 496 at 504.

> The precise meaning to be attached to 'accidentally' has not been determined, but ... where the fire is caused by negligence it is not to be regarded as accidental. Although there is a difference of opinion among eminent text writers whether at common law the liability was absolute or depended on negligence, at the present day it can safely be said that a person in whose house a fire is caused by negligence is liable if it spreads to that of his neighbour, and this is true whether the negligence is his own or that of his servant or his guest, but he is not liable if the fire is caused by a stranger.

This accords with the view of Higgins J. who said in *Bugge v. Brown* [1919] 26 CLR 110 at 130 that the statute limited liability to cases of negligence, though the negligence may be on the part of employees or independent contractors.

The modern English statement of the rule appears in the judgment of Lord Denning M.R. in *H & N Emanuel Ltd. v. Greater London Council* [1971] 2 All ER at 838.

> the occupier of a house or land is liable for the escape of fire which is due to the negligence not only of his servants, but also of his independent contractors and of his guests, and of anyone who is there with his leave or licence. The only circumstances when the occupier is not liable for the negligence is when it is the negligence of a stranger.

His Lordship explained the contemporary law in these terms *ibid.* at 839:

> The liability of the occupier can be said to be a strict liability in this sense that he is liable for the negligence not only of his servants but also of independent contractors and, indeed, of anyone except a 'stranger'. By the same token it can be said to be a 'vicarious liability', because he is liable for the defaults of others as well as his own. It can also be said to be a liability under the principle of *Rylands v. Fletcher*, because fire is undoubtedly a dangerous thing which is likely to do damage if it escapes. But I do not think it necessary to put it into any one of these three categories.

If Australian law had marched in step with English law, BPA's liability to General Jones would have been established simply on account of the negligence of BPA's independent contractor which started the fire. This was indeed the basis on which Neasey J. had held BPA liable. But Australian law took its own path, repudiating the *ignis suus* basis of liability as inappropriately rigorous.

It may have been that the natural and social conditions of this wide brown continent made the *ignis suus* rule an impossible burden for those who live in rural areas, especially in the early days of settlement. It would have been intolerable to impose an absolute liability on a landholder for the escape of any fire lit negligently by whosoever came upon his land by his leave and licence. Such a rule might have generally restricted the tradition of hospitality in the bush and would have been a disincentive to pastoralists to allow Aboriginal communities to camp on their holdings. Whatever the reason for rejecting the rule of *ignis suus*, in *Bugge v. Brown* Isaacs J. rejected a contention based on *Beaulieu v. Finglam* that an owner of land is liable for escape of any fire "kindled or kept by his servant whether negligently or not, and whether or not in the course of his employment". His Honour said ([1919] 26 CLR at 115) that "the rigorous proposition so contended for cannot now be maintained". In that case the fire was lit by a pastoral employee to cook his meat while he was out working on a station and the fire escaped by his negligence. The defendant was held liable in that case, but the reason advanced by the majority (Isaacs and Higgins JJ.) for so holding was that the lighting of the fire was within the scope of the employee's authority and the defendant was therefore vicariously liable for the employee's negligence. In *Hazelwood v. Webber* [1934] 52 CLR at 275 the *ignis suus* rule was invoked but

the majority (Gavan Duffy CJ, Rich, Dixon and McTiernan JJ.) held that other principles now governed liability for escape of fire:

> The special responsibility arising from the use of fire has come to be regarded as no more than an application of a wider general rule governing the liability of occupiers of property and, perhaps, others who introduce an agency from which harm may reasonably be expected unless an effective control of it is maintained. The grounds of excuse or exception have arisen in the development of this general rule rather than in connection with the ancient strict liability for the escape of fire.

Windeyer J. was thus able to say in *Hargrave v. Goldman* [1963] 110 CLR 40 at 58. See also per Starks J. in *Wise Bros. Pty. Ltd. v. Commissioner for Railways (NSW)* [1947] 75 CLR 59 at 70:

> This Court has held that the old rules have been absorbed into the principle of *Rylands v. Fletcher;* and that the strict liability of the common law is subject to the qualifications of and exceptions to that principle.

It may be that the movement from strict to qualified liability in tort, which has long been judicially noticed *(Stevens v. Brodribb Sawmilling Co. Pty. Ltd.* [1986] 160 CLR 16 at 42 per Wilson and Dawson JJ. and *Read v. J. Lyons & Co. Ltd.* [1947] AC 156 at 180), assisted first in the statutory qualification of *ignis suus* (see *Balfour v. Barty-King* [1957] 1 QB at 503) and later in the absorption of the tort of *ignis suus* in the rule in *Rylands v. Fletcher*. Whatever the explanation, the rule in *Rylands v. Fletcher* excluded the rule of *ignis suus* as an appropriate measure of the liability of an occupier of land or premises if damage is caused by the escape of fire. One consequence is that an owner or occupier of land or premises is no longer liable if a fire has been lit upon his land or premises without his authority by a licensee other than his servant and the fire escapes without negligence *(Hargrave v. Goldman* [1963] 110 CLR 40; [1966] 115 CLR 458; [1967] 1 AC 645) on the part of that owner or occupier. The Full Court was therefore right to reject the basis on which Neasey J. had held BPA liable. A more difficult question is whether BPA is liable under the rule in *Rylands v. Fletcher*.

The rule in Rylands v. Fletcher

The "true rule of law", as stated by Blackburn J. *Fletcher v. Rylands* [1866] LR 1 Ex at 279-280, is -

> that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God.

Lord Cairns LC affirmed that statement on appeal, *Rylands v. Fletcher* [1868] LR 3 HL at 339-340, but he drew a distinction *ibid.* at 338-339 between "the natural user" of land and "a non-natural use" by which he meant something brought onto the land "which in its natural condition was not in or upon it". His Lordship held that, as it was a non-natural use to bring water onto land and keep it in a reservoir, the defendants kept water in their reservoir at their peril and were liable, when the water escaped, for damage sustained by the plaintiff into whose mine the water flowed. Although Lord Cairns affirmed the rule stated by Blackburn J. in one part of his speech and stated the principle relating to non-natural use in another *ibid.* at 339, it was understood that liability under the rule in *Rylands v. Fletcher* was subject to an exception permitting natural use of the defendant's land. The scope of that exception has been the subject of much judicial and academic debate.

Before examining the exception, it is desirable first to identify the factor which attracts liability under the rule in *Rylands v. Fletcher*. This factor is the unusual and dangerous nature of what is brought onto the defendant's land. Wright J. in *Noble v. Harrison* [1926] 2 KB 332 at 342; see also *Leakey v. National Trust* [1980] QB 485 at 518 per Megew LJ cited as the "true principle of *Rylands v. Fletcher*" what Fletcher Moulton LJ (as he then was) had said in *Barker v. Herbert* [1911] 2 KB 633 at 642:

> This is not a case where a landowner has erected or brought upon his land something of an unusual nature, which is essentially dangerous in itself.

Then, in *Rickards v. Lothian,* Lord Moulton delivering the opinion of the Privy Council said [1913] 116 CLR 387 at 400-401; [1913] AC 263 at 280:

> It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community. To use the language of Lord Robertson in *Eastern and South African Telegraph Co. v. Cape Town Tramways Companies* [1902] AC 381 at 393, the principle of *Fletcher v. Rylands* 'subjects to a high liability the owner who uses his property for purposes other than those which are natural.'

The fact that a use is dangerous is an indication that it is non-natural. However, it was held in *Rickards v. Lothian* that a water supply in a city building was an ordinary use of land - "an almost necessary feature of town life" ([1913] 16 CLR at 402; [1913] AC at 281). The categories of use mentioned by Lord Moulton - a "special use bringing with it increased danger to others" and an "ordinary use of the land or such a use as is proper for the general benefit of the community" - have been treated as mutually exclusive, the former category attracting liability, the latter excluding liability. The latter category has been extended by expanding the notion of "ordinary use" beyond the meaning which Lord Cairns attributed to "natural use" in *Rylands v. Fletcher.* In *Read v. J. Lyons & Co., Ld.* Lord Uthwatt said ([1947] AC at 187) that "natural" did not mean "primitive."

In *Rickards v. Lothian* the Privy Council were concerned, on the one hand, to uphold the liability of an occupier whose "special use" of land exposed his neighbours to an increased risk of damage and, on the other, to exempt from liability an occupier whose use of land amounted to no more than an ordinary and reasonable enjoyment of the land having regard to local and contemporary practice. These objects are not easily to be reconciled, especially when the Courts do not treat "use" as connoting a state of affairs but include within the concept the doing of a particular act (see Williams, **"Non-natural Use of Land",** (1973) Cambridge Law Journal 310). In *Hazelwood v. Webber* [1934] 52 CLR at 277, this Court stated the scope of the rule in *Rylands v. Fletcher* in terms which looked to the purpose to which the land is or the premises are being put and the acts done incidentally to that purpose:

> when the use of the element or thing which the law regards as a potential source of mischief is an accepted incident of some ordinary purpose to which the land is reasonably applied by the occupier, the *prima facie* rule of absolute responsibility for the consequences of its escape must give way.

It is a condition of liability under *Rylands v. Fletcher* that by the act of the defendant, or of some person for whose act the defendant is responsible, there is on the defendant's land something dangerous "in the sense that, if it escapes, it will do damage": *Read v. J. Lyons & Co., Ld.* [1947] AC at 176 per Lord Porter. The act which creates or brings the dangerous thing on the land is the use which must be classified under one or other of Lord Moulton's categories.

The nature of a particular use of land depends upon the surrounding circumstances. Thus, in *Hazelwood v. Webber* [1934] 52 CLR at 278, a farmer's burning-off of stubble in mid-summer attracted liability as a non-natural use when fire escaped, the danger overriding the agricultural utility of the practice and the frequency with which other farmers burnt their fields (similarly, in New Zealand: see *New Zealand Forest Products Ltd. v. O'Sullivan* [1974] 2 NZLR 80 at 90). In *Torette House Pty. Ltd. v. Berkman* [1940] 62 CLR 637 at 654-655 Dixon J. said that, in determining the nature of a use of the defendant's land:

> the advantage to the occupier who succeeds in the harmless use of an agency such as a large quantity of water which is a potential source of mischief, and the frequency of its use by other occupiers, are not the only considerations. 'The degree of hazard to others involved in its use, the extensiveness of the damage it is likely to do and the difficulty of actually controlling it are even more important factors': cf. *Hazelwood v. Webber* [1934] 52 CLR at 278. Time, place and circumstance, not excluding purpose, are of course most material considerations.

The approach to be taken in determining the character of a use was defined by Gavan Duffy C. J., Rich, Dixon and McTiernan JJ. in *Hazelwood v. Webber ibid.*:

> The question is not one to be decided by a jury on each occasion as a question of fact. The experience, conception and standards of the community enter into the question of what is a natural or special use of land, and of what acts should be considered so fraught with risk to others as not to be reasonably incident to its proper enjoyment. (Emphasis added.)

The view taken by this Court that the character of a use is "not one to be decided by a jury" differs from the view taken by Lord Porter in *Read v. J. Lyons & Co., Ld* [1947] AC at 176. He thought it was a mere question of fact. The difference seems to me to be of some importance. If the character of a use is a mere question of fact, the rule in *Rylands v. Fletcher* would become another conquest in the imperial expansion of the law of negligence. It would be unlikely in practice that a different answer would be given to the question: "was the use so fraught with risk to others as not to be a natural use?" from the question" "was the use so fraught with risk to others that the defendant is liable for any failure to exercise reasonable care to prevent the escape of the dangerous thing? There is, of course, no legal imperative to contain the expansion of the law of negligence but, if it were to conquer the rule in *Rylands v. Fletcher*, a plaintiff who suffers loss by the escape of a dangerous thing from the defendant's land would go remediless unless the plaintiff could prove negligence contributing to the escape on the part of the defendant, his servants or agents or the escape amounted to a nuisance. Under *Rylands v. Fletcher*, the plaintiff can recover if the escape is caused by negligence on the part of the defendant's independent contractor or, more accurately, without proof of any negligence causing or contributing to the escape. "The whole point of *Rylands v. Fletcher* liability", said Menzies J. in *Benning v. Wong* [1969] 122 CLR 249 at 278, "is that the exercise of care is irrelevant". To eliminate the rule in *Rylands v. Fletcher* and to subject all cases now falling within that rule to the law of negligence would be to depreciate the duty which *Rylands v. Fletcher* imposes on the occupiers of land and premises and correspondingly to diminish the security which that rule confers on their neighbours. In *Cambridge Water Co. v. Eastern Counties Leather Plc.* [1994] 2 WLR 53 the House of Lords has maintained strict liability for damage in the event of escape of harmful things from the defendant's premises where damage of the relevant type was foreseeable if the thing should escape. Nevertheless, as we shall see, many cases in which a plaintiff might recover under *Rylands v. Fletcher* are cases in which the plaintiff might recover in negligence or in nuisance.

By remitting the question "what is a natural or special use of land?" for determination by the Judge, Courts have been able to control the scope of the liability under *Rylands v. Fletcher*. Thus liability was denied under that head when an occupier of a flour mill at Narrandera accumulated flammable dust in the manufacture of flour. *Wise Bros. Pty. Ltd. v. Commissioner for Railways (NSW)* [1947] 75 CLR at 68, 70, 73, 74 and when liability for a fire in Fremantle Harbour was sought to be imposed on the authority which brought fuel oil for ships to a berth in the harbour *(Eastern Asia Navigation Co. Ltd. v. Fremantle Harbour Trust Commissioners* [1951] 83 CLR 353 at 388, 396-397). Conversely, in *Benning v. Wong*, Windeyer J. was prepared to accept on the authority of precedent that the laying of gas pipes was a non-natural use of land ([1969] 122 CLR at 302). It is not surprising that he said *ibid.* in reference to cases relating to the "non-natural" use of land:

> Some of them seem to me to make a natural or non-natural use of land depend not on any certain objective criteria, but on whether it is a use of such a character that the defendant ought, in the opinion of the Court determining the particular case, to take the risk of having a dangerous thing where it was. (Emphasis added.)

Although the absence of objective criteria in the law of tort is unsatisfactory, the question whether land or premises is being "reasonably applied" to "an ordinary purpose" is a question which provides the Court with considerable guidance. In *Cambridge Water Co.* Lord Goff of Chieveley anticipated that the requirement of foreseeability of harm by escape may make the natural user exception to liability "easier to control" and having "a more recognizable basis of principle". He described the storage of substantial quantities of chemicals on industrial premises "as an almost classic case of non-natural use": [1994] 2 WLR at 83. And it is a question

which the Court, conscious of the policy of the law and of the effect of time, place and circumstance, and purpose or the nature of land use, is peculiarly well suited to answer.

The rule in *Rylands v. Fletcher* has been said *(Rickards v. Lothian* [1913] 16 CLR at 395-396; [1913] AC at 275) to rest on the principle *sic utere tuo ut alienium non laedas* ("so use your own property as not to injure the rights of another" Broom's **Legal Maxims,** 10th Edn., (1939) at 238 n. (z)). It imposes a duty arising out of the use of land or premises on "occupiers of property and, perhaps, others who introduce an agency from which harm may reasonably be expected unless an effective control of it is maintained": *Hazelwood v. Webber* [1934] 52 CLR at 275. Note the similarity between "harm reasonably expected" and the requirement of "foreseeability of damage of the relevant type" in *Cambridge Water Co.* "The foundation of the rule", Windeyer J. said in *Benning v. Wong* [1969] 122 CLR at 298, "is that the bringing of things with mischievous possibilities or propensities upon land creates a duty to confine them there. The harm they do by escaping could not occur but for the act of bringing them to the place whence they escape." But *Rylands v. Fletcher* does not impose liability on an occupier of land if the mischievous thing is not created or brought on to the land with the occupier's authority or kept there for the occupier's purpose. In *Hargrave v. Goldman* [1963] 110 CLR 40; on appeal [1966] 115 CLR 458; [1967] 1 AC 645 where lightning struck and lit a tree on the defendant's land whence a fire spread after a time to neighbouring land, the defendant was held liable for allowing the fire to spread, but his liability was found in nuisance and in negligence, not under *Rylands v. Fletcher.* Although fire is a thing likely to do mischief if it escapes, *Rylands v. Fletcher* was "excluded simply because the respondent did not bring the fire upon his land, nor did he keep it there for any purpose of his own. It came there from the skies. And he did nothing to make its presence there more dangerous to his neighbours." ([1963] 110 CLR per Windeyer J. at 59; and see [1966] 115 CLR at 460; [1967] 1 AC at 656). And in *McInnes v. Wardle* [1931] 45 CLR 548 the liability of the farmer for escape of fire lit by his independent contractor to assist in the fumigation of rabbits depended upon a finding that the farmer had authorized the independent contractor to light the fire. (ibid. at 550, 552; see also *Black v. Christchurch Finance Co.* [1894] AC 48 at 54). By contrast, in *Torette House Pty. Ltd. v. Berkman* [1940] 62 CLR 637, the defendant occupier of the premises from which the water escaped was held exempt from liability. In that case, the escape of water which damaged the plaintiff's premises was caused by the negligence of the defendant's plumber, an independent contractor, who negligently turned a stopcock causing water to flow out of an uncapped pipe in the water supply system. The defendant was not vicariously liable for the negligence of his independent contractor in turning on the water, nor was he liable under *Rylands v. Fletcher,* for the installation of a water supply system was a natural use of his premises.

In this case, Isolite packed in cardboard cartons was brought onto BPA's premises by WS. It was not a danger unless the cartons were ignited or heat of sufficient intensity was otherwise applied. But the cartons of Isolite were stored near the welding site in the roof void and there was a possibility that molten metal, spattered around the welding site, might ignite the cartons of Isolite. BPA can be taken to have authorized the use of the roof void for construction purposes, including welding and bringing in Isolites to insulate the pipes carrying refrigerant. The carrying out of welding near a stack of cartons of Isolite and the stacking of cartons of Isolite near the site of a welding operation were, however, acts done solely on the initiative of the employees of WS. The employees of WS acted in breach of such elementary precautions that it would be wrong to find that BPA expected that they would act in that way. The authority given by BPA to use the roof void for welding and the storage of cartons of Isolite cannot be held to embrace an authority to use the roof void by doing the acts which resulted in the fire. This case is thus distinguishable from *McInnes v. Wardle* and *Black v. Christchurch Finance Co.* where the actual setting of the fire was held to be within the authority conferred by the defendant. The acts which caused the Isolite to ignite were the unauthorized and negligent acts of WS, an independent contractor. The question of BPA's liability for the acts of the WS employees is examined in more detail later in this judgment.

If BPA had authorized the stacking of the cartons of Isolite near the welding site, it would have been responsible for an unusual and dangerous use of the premises [*Mason v. Levy Auto Parts*

of England Ltd. [1967] 2 QB 530 at 542-543 and it would have been liable to General Jones under *Rylands v. Fletcher.* It would have been immaterial to that liability that BPA did not know of the danger *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co.* [1921] 2 AC 465 at 471. It can be accepted that welding carries a risk of starting a fire if flammable materials are close by and that Isolite is, given a sufficient source of initial heat, flammable material. No doubt, as the Full Court held, the failure of the employees of WS to take elementary precautions before welding - either by moving the stack of Isolite cartons or by covering them - means that the welding operation was not a natural use of BPA's premises, but BPA did not authorize welding near the stack of cartons. BPA authorized the general work of construction which included the welding and the bringing of Isolite into the roof void for the purpose of insulating pipes, but neither of those acts was by itself a source of danger. The welding and the bringing of cartons of Isolite into the roof void were the accepted incidents of the construction of the cold store extension. That work, to which General Jones had agreed by the terms of its licence, was an ordinary purpose to which the premises were reasonably applied by the occupier. BPA authorized a natural use of its premises but, as it did not authorize the acts which ignited the Isolite, it is not liable under *Rylands v. Fletcher* for the damage suffered by General Jones when the fire escaped into its premises.

Nevertheless, the construction work which WS had contracted to perform - like many other construction works - exposed the owners or occupiers of neighbouring premises to a risk of damage if the contractor or its employees should perform the work negligently. Is a building owner liable in negligence because he authorizes an independent contractor to perform works attended by such a risk?

Negligence

WS was an independent contractor which undertook part of the construction of the cold store for BPA. The liability of BPA for negligence on the part of WS's employees in performing that work depends on principles which Dixon J. stated in *Colonial Mutual Life Assurance Society Ltd. v. Producers and Citizens Co-operative Assurance Co. of Australia Ltd.* [1931] 46 CLR 41 at 48; see also *Kondis v. State Transport Authority* [1984] 154 CLR 672 at 691-692:

> In most cases in which a tort is committed in the course of the performance of work for the benefit of another person, he cannot be vicariously responsible if the actual tortfeasor is not his servant and he has not directly authorized the doing of the act which amounts to a tort. The work, although done at his request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative but as a principal.

There are two exceptions, or apparent exceptions, to the general rule that an employer is not liable for a tort committed by his independent contractor: the first, when the employer directly authorizes "the doing of the act which amounts to a tort"; the second, when the employer engages the independent contractor to perform a duty resting on the employer and the independent contractor fails to perform it. Where the employer is sought to be made liable for the negligent conduct of an independent contractor but that conduct has not been authorized by the employer and is not breach of a duty of care resting personally on the employer, the negligence is said to be "collateral" (Lord Blackburn used the term in *Dalton v. Angus* [1881] 6 App Cas 740 at 829, it had been used by Pollock C.B. in *Hole v. Sittingbourne and Sheerness Railway Co.* [1861] 6 H & N 488 at 497 [158 ER 201 at 204]) and creates no liability in the employer.

In some cases where an employer is held liable for the tort of an independent contractor, the ground of liability can be seen clearly to be either authorization of a negligent act (as in *Black v. Christchurch Finance Co.* [1894] AC at 54; *McInnes v. Wardle)* or non-performance of an employer's personal duty (as in *The Commonwealth v. Introvigne* [1982] 150 CLR 258 at 270-271, 274-275, 279-280) but the two grounds coalesce where the doing by an independent contractor of an act authorized by the employer gives rise to a duty resting on the employer

personally. In such a case, the relevant principle is that stated by Mason J. in *Stoneman v. Lyons* [1975] 133 CLR 550 at 574:

> Although the general rule is that a person is not liable for the negligence of his independent contractor, it is accepted that a person who owes a duty to a third party cannot avoid responsibility for discharging that duty by delegating performance of it to an independent contractor.

Dixon J. in *McInnes v. Wardle* [1931] 45 CLR at 552 and cf. *Torette House Pty. Ltd. v. Berkman* [1940] 62 CLR at 651 pointed out that an occupier of land may come under a duty by reason of acts done by an independent contractor:

> The duty of an occupier to take care that his land is so used and the operations carried out upon it are so managed that his neighbours are not exposed to injury by exceptional dangers is not confined to dangers arising from acts of himself and his servants. (See per Littledale J. in *Laugher v. Pointer* [1826] 5 B & C 547 at 560 [108 ER 204 at 209]; per Jessel M.R. in *White v. Jameson [1874]* LR 18 Eq 303 at 305; and *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co.* [1921] 2 AC 465.

The general principle was stated by Cockburn CJ in *Bower v. Peate* [1876] 1 QBD 321 at 326-327

> {A} man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else - whether it be the contractor employed to do the work from which the danger arises or some independent person - to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury, resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise.

There is a difficulty with this passage if it is applied in a case where negligence is in issue. The difficulty lies in the words "is bound to see to the doing of that which is necessary to prevent the mischief", for those words suggest that the duty is an absolute duty "to prevent the mischief", a duty higher than a duty to exercise reasonable care. There are some cases, notably the rule in *Rylands v. Fletcher* and the law of nuisance, where the act authorized to be done does impose on the employer of an independent contractor a duty higher than a duty to exercise reasonable care. *Don Brass Foundry Pty. Ltd. v. Stead* [1948] 48 SR (NSW) 482 at 486. Therefore, where the authorized act is or creates a non-natural use of land as in *McInnes v. Wardle*, or in the absence of preventive measures will create a nuisance *(Matania v. National Provincial Bank Ltd.* [1936] 2 All ER 633; *Dalton v. Angus* [1881] 6 App Cas 740; *Odell v. Cleveland House (Limited)* [1910] 26 TLR 410; cf. per Mason J. in *Kondis v. State Transport Authority* [1984] 154 CLR at 685), the duty of the employer is, in the one case, to prevent escape of the mischievous thing or, in the other, to prevent the occurrence of the nuisance. But the duty in negligence is not so demanding. Cockburn CJ therefore stated the principle too broadly.

In *Dalton v. Angus* [1881] 6 App Cas at 829; see also at 791 per Lord Selborne LC Lord Blackburn adopted the general principle of *Bower v. Peate* but, in *Hughes v. Percival* [1883] 8 App Cas 443 at 447, he thought that *Bower v. Peate* might be too broadly stated since it might be taken to impose a duty in a negligence case higher than a duty to take reasonable care. Nevertheless, he accepted that, as *Bower v. Peate* was a case of interference with the plaintiff's right of support - a case in nuisance - it was rightly decided. His Lordship had been careful, in *Dalton v. Angus*, not to define the extent of the different duties which may devolve on an employer who, to use the words of Cockburn CJ, "orders a work to be executed (by an independent contractor), from

which, in the natural course of things, injurious consequences to his neighbour must be expected to arise". Lord Blackburn said ([1881] 6 App Cas at 829):

> Ever since *Quarman v. Burnett* [1840] 6 M & W 499 [151 ER 509] it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it: *Hole v. Sittingbourne Railway Co.*; *Pickard v. Smith* [1861] 10 CB (NS) 470 [142 ER 535]; *Tarry v. Ashton* [1876] 1 QBD 314.

In Canada, a similar approach can be seen in the judgment of Duff J. in *Vancouver Power Co. v. Hounsome* [1914] 19 DLR 200 at 204.

The extent of the duty imposed on the employer in a particular case is precisely the same as it would be if the act were done by the employer. The extent of the duty therefore depends on the nature of the liability which would attach if the injurious consequences of the authorized act were not prevented: a duty to take reasonable care to avoid the injurious consequences when the only tortious liability would be for negligence; a higher duty when the tortious liability would be for nuisance or under *Rylands v. Fletcher*.

In *Stoneman v. Lyons*, the plaintiff sought to impose a higher duty on the ground that the work which the employer has authorized his independent contractor to perform was an "extra-hazardous act". The Court rejected the notion that the doing of an extra-hazardous act imposed a higher duty than the duty to take reasonable care. Rather, citing *Read v. J. Lyons & Co., Ld.*, it was said ([1975] 133 CLR at 575) that what has to be done to perform the duty to take reasonable care is proportioned to the danger created by the doing of the relevant act. In *Stevens v. Brodribb Sawmilling Co. Pty Ltd.* [1986] 160 CLR at 42-44, Wilson and Dawson JJ. affirmed that proposition and cited the authorities in this Court which support it. However, when an act done by an independent contractor and authorized by the employer creates or increases the risk of injury to a third party, the employer who authorizes the act brings himself into such a relationship with the third party that he is bound to take reasonable care to prevent the occurrence of that injury *(Sutherland Shire Council v. Heyman* [1985] 157 CLR 424 at 479). The duty is personal and, if it is not performed, the employer is responsible. In practice, the act which gives rise to a duty in the employer to take reasonable care will be one which, in the natural course of things, involves the risk of injurious consequences to a third party. In that sense, the act will be naturally "dangerous".

Where the occupier of premises engages an independent contractor to perform on his premises work which naturally carries a risk of damage to neighbouring premises and performance of the work results in such damage, the employer's liability can be imposes not only by the law of negligence but also by the law of nuisance (see the cases above). The duty arising under the law of negligence may then be subsumed by the higher duty arising under the law of nuisance, but it does not follow that the law of negligence imposes some special duty when extra-hazardous acts are authorized. That notion was dispelled by *Stoneman v. Lyons*. So for as it is material to consider the duty arising under the law of negligence, the work done by an independent contractor on an employer's premises will impose on the employer a duty to take reasonable care to avoid its injurious consequences on a neighbour's premises only if the work naturally involved a risk of those consequences. Where injurious consequences flow from the negligent manner in which an independent contractor does an authorized act and not from the nature of the act which was authorized, the employer is not liable. In *Hole v. Sittingbourne & Sheerness Railway Co.* [1861] 6 H & N at 497-498 [158 ER at 204-205] Pollock CB said:

> Where the act complained of is purely collateral, and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorized that act - the remedy is against the person who did it ....

a

> But when the contractor is employed to do a particular act, the doing of which produces mischief, another doctrine applies.

The distinction in principle was stated by Fletcher Moulton LJ in *Padbury v. Holliday and Greenwood Limited* [1912] 28 TLR 494 at 495 in reference to what Lord Watson had said in *Dalton v. Angus:*

b

> before a superior employer could be held liable for the negligent act of a servant of a sub-contractor it must be shown that the work which the sub-contractor was employed to do was work the nature of which, and not merely the performance of which, cast on the superior employer the duty of taking precautions. (Emphasis added.)

The distinction between a risk of damage arising from the nature of the authorized work and a risk of damage arising from the manner in which work is performed distinguishes negligence for which the employer is liable from "collateral" or incidental negligence for which he is not.

c

In *Torette House Pty. Ltd. v. Berkman* [1939] 39 SR (NSW) 156 at 170 Jordan CJ said:

> A person who procures the doing of an act is liable for its actual consequences and for anything necessarily involved in its being done whomsoever he may have procured to do it. He is liable for the acts of any agent of his acting within the scope of his employment. For the actual breach of any duty owed by himself he is responsible whatever steps he may have taken or agency he may have employed to endeavour to prevent a breach. In certain special circumstances, if he causes an act to be done he incurs a liability to see that care is used to prevent injury from being caused by methods incidentally
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> used to produce the result, whomsoever he may employ it. But there is no general rule that if a person employs an independent contractor to do an inherently lawful act, he incurs liability for injury to others occasioned by the methods incidentally employed by the contractor in the course of its performance (these not being methods necessarily involved in the doing of the act and necessarily injurious), by reason only of the fact that the act is 'dangerous,' 'hazardous,' or 'extra hazardous.

And in *Stoneman v. Lyons,* Stephan J. said [1975] 133 CLR at 564:

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> An employer will, whether or not the activity is regarded as extra-hazardous, be liable in negligence for the consequence to third parties both of acts which he specifically authorizes or directs and of methods not so authorized but which are necessarily involved in performing those acts. For the consequences of other negligent conduct of the contractor the employer will not be liable.

Thus no duty to take reasonable care is imposed on an employer merely because damage might be done if the independent contractor authorized to perform an act adopts a careless method of

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doing it and no liability is imposed on the employer merely because damage is done by carelessness in the method adopted. Such carelessness on the part of an independent contractor is the "collateral negligence" of which Lord Blackburn spoke and for which the employer is not responsible. It is a question of fact whether damage has been caused by collateral negligence or by a failure to perform the duty of care resting on the employer. It may be a question of some difficulty. The case will fall into the latter category if the risk of damage arises from the way in which the work will necessarily be done or from the way in which the employer expects that

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it will be done as in *Black v. Christchurch Finance Co. or McInnes v. Wardle,* for in each of those situations the incurring of the risk is authorized by the employer. But the employer is not liable merely because it is foreseeable that the independent contractors might, on his own initiative adopt a careless way of doing the work. If liability were imposed on an employer in the situation, the employer would become a virtual guarantor of the independent contractor's carefulness.

In the present case, General Jones' claim against BPA in negligence fails for precisely the same

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reason as its claim under *Rylands v. Fletcher* fails. BPA can be taken to have authorized welding in the roof void and the storing of Isolite in the roof void, for those activities were necessarily involved in constructing the cold store extension. But neither of those activities might have been expected to cause damage to General Jones' premises provided WS performed the work without negligence. Damage was caused to General Jones' premises by the dangerous act of welding near the stack of Isolite cartons and that was a method of doing the work "incidentally employed by the contractor". The doing of that act was "collateral" negligence for which BPA is not liable.

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The three bases on which General Jones put its case fall. The appeal must be allowed, the order of the Full Court set aside and, in lieu thereof, the appeal to that Court must be allowed and judgment entered for BPA in the claim made against it by General Jones.

McHugh J:

Burnie Port Authority ("BPA") appeals against an order of the Full Court of the Supreme Court of Tasmania which upheld an award of damages made in favour of the respondent, General Jones Pty. Limited ("General Jones"). The damages were awarded for the loss suffered by General Jones when fire spread from part of premises occupied by BPA to another part of the premises occupied by General Jones. The Full Court, reversing the trial Judge's decision, held that BPA was not liable under the ancient common law doctrine of "ignis suus". However, it held that BPA was liable under the rule in *Rylands v. Fletcher* [1866] LR 1 Ex 265; affd [1868] LR 3 HL 330. In my opinion the appeal should be allowed on the ground that BPA was not liable under the doctrine of "ignis suus" the rule in *Rylands v. Fletcher*, or in negligence. No claim in nuisance was relied upon in this Court.

The factual background

On 20 December 1979, a fire broke out in a cold store, owned by BPA at Burnie in Tasmania, which was in the process of construction. Part of the store (Stage 1) was completed. General Jones used that part to store frozen foods. Another part of the building (Stage 2) was under construction. The construction work was being carried out by BPA. BPA had employed Wildridge & Sinclair Pty. Limited ("Wildridge") to lag refrigeration pipes.

On 20 December 1979, seven employees of Wildridge were doing welding in the roof of Stage 2. During the course of welding a steel plate that was to support a refrigeration unit, sparks from the welder ignited a stack of cartons containing Isolite. Isolite is a highly flammable insulation material. The fire destroyed the building within a few minutes. An employee of BPA was aware that Stage 2 contained cartons of Isolite. BPA does not dispute that Wildridge was guilty of negligence in causing the cartons to be set alight or that the fire escaped from Stage 2 to Stage 1 and damage of $2.246, million to the property of General Jones.

The "ignis suus" principle

The first question in the appeal is whether the *"ignis suus"* principle is part of the common law of Australia. Although that principle remains part of the common law of England, in my opinion it is not part of the common law of Australia.

At common law, the occupier of premises was liable for the act of any person who entered the occupier's house by leave or to his or her knowledge and who did any act which caused a neighbour's house to burn *(Beaulieu v. Finglam* [1401] YB 2 Hen iv F. 18 pl. 6; translated in Fifoot, **History and Sources of the Common Law,** (1949) at 166). This was the *"ignis suus"* (his fire) principle. The remedy of the person whose house was burnt was an action of the case. Debate has ensued as to whether the plaintiff was required to prove that the fire was the result of negligence. Support for the view that the plaintiff had to prove negligence arises from the use of the term "negligenter" in the form of action. However, the better view is that this allegation was a pleader's flourish **(Comyns's Digest,** 4th Edn., (1800), Vol. 1 at 284-285; Winfield on **Tort,** 8th Edn., (1967) at 438). *Turberville v. Stampe* [1697] 1 Ld Raym 264 [91 ER 1072], however established that the occupier was not liable for a fire which was started by a stranger or by an act of God (see also *Becquet v. MacCarthy* [1831] 2 B & Ad 951 [109 ER 1396]). Subsequently, liability for purely accidental fire was abolished by statute in the reign of Queen Anne (6 Anne c. 31, s. 6. In Tasmania, the relevant enactment is the Supreme Court Civil Procedure Act 1932, s. 11(15)). But, according to a long line of authority, a fire started negligently was not started accidentally within the meaning of the Statute of Anne *(Goldman v. Hargrave* [1967] 1 AC 645 at 664-665).

Unquestionably, the *"ignis suus"* principle remains part of the common law of England *(Balfour v. Barty-King* [1957] 1 QB 496; *H & N Emanuel Ltd. v. Greater London Council* [1971] 2 All ER 835). In *Balfour v. Barty-King* [1957] 1 QB 496, the Court of Appeal held that an occupier of land was liable for damage caused by the escape of a fire resulting from the acts of independent contractors working on the land. The Court held *(ibid.* at 502) that there was a "special duty of guard against an escape of fire" which had been established by *Beaulieu v. Finglam* [1401]

YB 2 Hen iv f. 18 pl. 6 and Turberville. In *H. & N. Emanuel Ltd. v. Greater London Council* [1971] 2 all ER 835 at 838, Lord Denning M.R. said:

> (T)he occupier of a house or land is liable for the escape of fire which is due to the negligence not only of his servants, but also of his of his independent contractors and of his guests, and of anyone who is there with his leave or licence. The only circumstances where the occupier is not liable for the negligence is when it is the negligence of a stranger.

However, the "*ignis suus*" principle is not part of the common law of Australia. In this country, liability for fire is not the subject of a special common law rule. It is covered by the rule in *Rylands v. Fletcher*. At all events, that was the conclusion of Windeyer J. in *Hargrave v. Goldman* [1963] 110 CLR 40 at 58. His Honour cited two cases in support of that conclusion - *Bugge v. Brown* [1919] 26 CLR 110 and *Hazelwood v. Webber* [1934] 52 CLR 268. Counsel for General Jones claimed that these cases did not support his Honour's conclusion. However, in my opinion they do support it. In Hazelwood *ibid.* at 275, Gavan Duffy C.J., Rich, Dixon and McTiernan JJ., after referring to the common law principle of liability for fire said:

> The special responsibility arising from the use of fire has come to be regarded as no more than an application of a wider general rule governing the liability of occupiers of property and, perhaps, others who introduce an agency from which harm may reasonably be expected unless an effective control of it is maintained.

This wider general rule was clearly a reference to the rule in *Rylands v. Fletcher*. In *Bugge* [1919] 26 CLR at 114-115, Isaacs J. recorded that, during the argument in that case, the Court had ruled that an owner of land was not liable "for damage caused by any fire there in fact kindled or kept by his servant whether negligently or not". His Honour said *ibid.* at 115: "Whatever may have been anciently considered the true rule of the common law, the rigorous proposition so contended for cannot now be maintained."

Furthermore, in *Whinfield v. Lands Purchase & Management Board of Victoria and State Rivers & Water Supply Commission of Victoria* [1914] 18 CLR 606, the Court held that the occupier of land was not liable for an escape of fire caused by the negligence of one of its employees who, with its permission, was camping on the defendant's land. Both the reasoning and the actual decision are inconsistent with the existence of the' "ignis suus" principle being part of the law of Australia. Indeed, Isaacs J. dealt with the case on the basis that, if the defendant was liable, it was liable under the rule in *Rylands v. Fletcher*.

Then, in *McInnes v. Wardle* [1931] 45 CLR 548, where the Court held that the employer of an independent contractor was responsible for the spread of fire which the contractor had started, none of the reasons for judgment relied on the common law principle of "*ignis suus*". Nevertheless, Counsel for General Jones relied on a passage in the judgment of Evatt J. in that case to support the existence in Australia of the "*ignis suus*" principle. His Honour said *ibid.* at 552:

> *Black v. Christchurch Finance Co.* [1894] AC 48 established that a person who authorizes the use of fire in order to clear or burn off on land occupied by him is under a duty to neighbouring landholders to see that reasonable care is exercised to prevent the fire from spreading.

However, the reference to reasonable care in that passage makes it plain that his Honour was not intending to apply the doctrine of "*ignis suus*" formulated by the early common law.

Finally, in *Wise Bros. Pty. Ltd. v. Commissioner for Railways (NSW)* [1947] 75 CLR 59, the Court held that Hazelwood was authority for the proposition that the "*ignis suus*" principle was not part of the law of Australia (see *ibid.* at 67, 68, 70, 73-74).

Having regard to these authorities, it is not possible to hold that the "ignis suus" principle is part of the common law of Australia. Accordingly, the Full Court of the Supreme Court of Tasmania was correct in the present case in rejecting the argument that the "*ignis suus*" principle is part of the common law of Australia and entitled General Jones to succeed in the present action.

Rylands v. Fletcher

In *Fletcher v. Rylands* [1866] LR 1 Ex at 279-280, Blackburn J. said:

> We think that the true rule of law is, that the person who for his own purpose brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just.

When the case was taken on appeal to the House of Lords, Lord Cairns L.C. and Lord Cranworth expressly agreed with that statement *(Rylands v. Fletcher* [1868] LR 3 HL at 340). However, in the course of his speech, Lord Cairns drew *(ibid.* at 339) a distinction between the "natural use" of the defendant's land and its "non-natural use".

The rule in *Rylands v. Fletcher,* like other common law rules, has undergone much exposition and development since it was first formulated by Blackburn J. in *Fletcher v. Rylands* [1866] LR 1 Ex at 279-280. The genius of the common law is that the first statement of a common law rule or principle is not its final statement. Rules and principles are modified and expanded by the pressure of changing social conditions and the experience of their practical application in the life of the community. In Australia, however, the rule in *Rylands v. Fletcher* has undergone little, if any, development in the last sixty years. The reason for this is that, in *Hazelwood* [1934] 52 CLR at 277, this Court explained the rule in terms which have been regarded as authoritative.

In *Hazelwood* [1934] 52 CLR at 277-278, Gavan Duffy CJ, Rich, Dixon and McTiernan JJ. said:

> The principle upon which a *prima facie* absolute liability appears to be imposed by the law is that no man should at the expense of his neighbour introduce upon his own land a potential source of harm which is considered to require continual and effective control or restraint to prevent mischief. If through a failure or relaxation of control damage to his neighbour occurs, although without negligence on his part, he should indemnify his neighbour. But when, to obtain effectual use and enjoyment of land in a reasonable manner according to its character and the uses for which it is adapted, occupiers find that the introduction of such a potential source of harm is generally necessary, to insist upon the *prima facie* rule would be to restrict the proper enjoyment of the land or to impose a special responsibility for loss arising from a danger to which by the recognized use of the land every occupier exposed himself and other occupiers. Accordingly, when the use of the element or thing which the law regards as a potential source of mischief is an accepted incident of some ordinary purpose to which the land is reasonably applied by the occupier, the *prima facie* rule of absolute responsibility for the consequences of its escape must give way. The terms in which the grounds of this exception from or exclusion of the *prima facie* rule have been described have varied, and both because of this variation and of their indefiniteness, have been open to criticism ... But in the decision which finally confirmed the general application of this exclusion of absolute responsibility, namely, *Rickards v. Lothian* [1913] AC 263 at 280, Lord Moulton defined the rule to be that the occupier's liability independent of negligence arose from 'some special use bringing with it increased danger to others' and 'not merely ... the ordinary use of the land or such a use as is proper for the general benefit of the community'.

In my experience, this authoritative exposition of the rule has proved a satisfactory, if not sure, guide to its proper application. Of course, views will inevitably differ as to what results should flow from the application of the rule. But in the application of legal rules and principles there is nothing novel about that experience.

In England, the position is very different. From the beginning of the post-*Rylands v. Fletcher* period, English Courts have sought to restrict the scope of that case (see, for example, *Green v. The Chelsea Waterworks Company* [1894] 70 LT 547 at 549 where Lindley LJ said that it was "not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision"). When, in *Read v. J. Lyons & Co. Ltd.* [1947] AC 156, the House of Lords did not greet the rule with any enthusiasm, it became obvious that English law would not develop a comprehensive and coherent theory of strict liability for hazardous conduct. No doubt this attitude to the rule

in *Rylands v. Fletcher* was the consequence of the belief that civil liability should depend on moral fault, an idea that began to influence English legal thinking in the second half of the nineteenth century and still finds support in common law jurisdictions. As is generally the case when Courts are not enthusiastic about a legal rule, the decisions as well as *dicta* in English cases on the rule in *Rylands v. Fletcher* are not easy to reconcile. Thus, to evaluate the rule in terms of the English cases phrases used by Blackburn J. would be to ignore the significant Australian contribution to the understanding of the rule. Moreover, *Rylands v. Fletcher* contains a common law principle, not a statutory enactment. In applying the common law, it is not the function of "Judges to frame definitions or to lay down hard and fast rules. It is their function to enunciate principles and much that they say is intended to be illustrative or explanatory and not to be definitive". *Broome v. Cassell & Co. Ltd.* [1972] AC 1027 at 1085 per Lord Reid. In *Benning v. Wong* [1969] 122 CLR 249 at 299, Windeyer J., speaking of the rule in *Rylands v. Fletcher,* said:

> What the Court of Exchequer Chamber and the House of Lords did was to state a doctrine or principle of the common law. To regard the words used as if they were the provisions of a statute defining in precise and permanent terms the limits of legal rights and duties seems to me a mistake.

Counsel for General Jones suggested that the rule in *Rylands v. Fletcher* had been incorporated into the law of negligence. Just when or how this incorporation occurred was not explained. In view of the decisions of this Court in *Lothian v. Rickards* [1911] 12 CLR 165, *Hazelwood, Torette House Pty Ltd. v. Berkman* [1940] 62 CLR 637, *Wise Bros., Eastern Asia Navigation Co. Ltd. v. Fremantle Harbour Trust Commissioners* [1950] 83 CLR 353 and *Benning,* the incorporation must have occurred only in recent years. Moreover, it has escaped the attention of the authors of texts on the law of torts who have devoted separate chapters to the rule in *Rylands v. Fletcher.*

Irrespective of whether the rule in *Rylands v. Fletcher* is or is not a satisfactory ground of tortious liability, for more than one hundred years it has been treated in this country as a settled rule of liability in no way dependent upon proof of negligence. In *Benning* [1969] 122 CLR at 278, Menzies J. said:

> The whole point of *Rylands v. Fletcher* liability is that the exercise of care is irrelevant. The liability for injury by reason of the escape of the dangerous substance brought on to premises is absolute save for well defined defences such as an act of God. To admit a defence of no negligence as an answer to a *Rylands v. Fletcher* claim would virtually defeat the very purpose of the rule itself and it is clear that the original foundation of the rule did not admit care as a defence in any circumstances at all. The duty established was to insure against damage from a dangerous thing brought upon premises if it escape, even without negligence.

With great respect to those who are of the contrary opinion, I do not see how, consistently with the settled doctrine of this Court, the liability of an occupier of land under the rule in *Rylands v. Fletcher* can be understood as assimilated to, or could be incorporated into, an occupier's liability in negligence. It is true that, in some circumstances in an action for negligence, an occupier of land is liable for the acts of independent contractors. In that respect there is a superficial similarity between liability in negligence and liability under the *Rylands v. Fletcher* rule. However, the similarity is superficial because in negligence the occupier is only liable for the **negligent** acts of an independent contractor. Under *Rylands v. Fletcher,* on the other hand, the occupier of land is liable for the harmful thing whether or not the contractor's acts were negligent.

Once one moves out of the area of independent contractors, any similarity between an occupier's for negligence and the rule in *Rylands v. Fletcher* disappears. Outside the area of independent contractors, the occupier of land is liable in negligence only for his or her own negligence or the negligence of his or her employee. Under *Rylands v. Fletcher,* the occupier is liable for an escape caused by any person other than a stranger, irrespective of negligence.

The most important difference between the action for negligence and the action based on *Rylands v. Fletcher,* however, is that the occupier of land is not liable under *Rylands v. Fletcher* unless the escape of the dangerous substance was the result of what Lord Cairns in that case described as a "non-natural use" of land. As the judgment of this Court in *Hazelwood* [1934] 52

CLR at 278 explains, a non-natural use of the land occurs only when some special use is made of the land which brings with it increased danger to those outside the land.

Furthermore, it is a question of law for the trial Judge to determine whether the use of the land amounts to a special use bringing with it increased danger to others. As the Court pointed out in *Hazelwood ibid:*

> The question is not one to be decided by a jury on each occasion as a question of fact. The experience, conceptions and standards of the community enter into the question of what is a natural or special use of land, and of what acts should be considered so fraught with risk to others as not to be reasonably incident to its proper enjoyment.

In *Hanadcraft Supply Co. Pty Ltd. v. Commissioner for Railways* [1959] 77 WN (NSW) 84 at 87, Jacobs A.-J. said that the concept of natural use:

> is, apparently, a changing one and, perhaps, this is one of the rare cases where the law openly recognizes the effect of social and economic circumstances upon the determination of questions of law in the judicial process. It appears to me that there is no more than that which is involved. The Judge is bound to apply to the question whether the user is a natural or non-natural one the experience, conceptions and standards of the community in which he is. The Judge must take into account all the various matters, such as climate, character of the country and natural conditions. He must bear in mind the competing social needs which are involved and he must, as best he can, determine the matter as one of law.

In those States where actions based on *Rylands v. Fletcher* and negligence are tried by juries, the issue of non-natural use is determined by the Judge, the issue of negligence by the jury.

In determining the issue of non-natural use, factors that would be decisive on an issue of negligence will frequently be of only marginal relevance on the issue of non-natural use. Often, they will be irrelevant to the latter issue. In determining whether a use of land is natural, the Court does not look at all the particular circumstances of the individual occupier but whether, in the time, place and circumstances of the particular community, the **character** of the use of the land by that occupier constitutes a non-natural use.

Thus, in the classic *Rylands v. Fletcher* situation, land is used for a non-natural purpose even though the particular amount of water stored is small and the walls of the reservoir are thick and high. Similarly, burning a domestic fire to warm a room does not constitute a non-natural use of the premises because the fire has no guard and is left unattended *(sochacki v. Sas* [1947] 1 All ER 344). Non-natural use of land is a different concept from the negligent use of the land *(Whinfield* [1914] 18 CLR at 616; *Hazelwood* [1934] 52 CLR at 275-277; *Torette House* [1940] 62 CLR at 654-655; *Wise Bros* [1947] 75 CLR at 68; *Smith v. Badenoch* [1970] SASR 9 at 13-14; *Rickards v. Lothian* [1913] 16 CLR 387 at 401; [1913] AC at 280; *Read* [1947] AC at 176; *British Celanese v. A.H. Hunt Ltd.* [1969] 1 WLR 959 at 963).

Counsel for General Jones insisted that the **manner** of performing an operation was relevant to the issue of non-natural use and that cases which had ignored the manner of use were wrongly decided. But the submission must be rejected. No doubt there are cases where Courts have looked at the manner of an operation on an occupier's land. But, with respect, this approach is wrong. Circumstances are relevant to the issue of non-natural use. But manner of performance is not *(Hazelwood* [1934] 52 CLR 268; *Bayliss v. Lea* [1959] 61 SR (NSW) 247). In determining whether a use is a natural use, regard must be had to what the occupier did. It is then necessary to determine whether that class of activity constitutes a natural use having regard to the time, place and circumstances including the conduct of other members of the relevant community. Inevitably, the Court must consider the risk involved, including the risk of escape from the class of activity, and the potential magnitude of the damage. But the exercise does not involve any close examination of the specifics. In a fire case, the Court does not examine how many hydrants or hoses were available. Nothing in *Hazelwood* supports any contrary view. The Court's reference *(ibid.* at 278) to "the benefit obtained by the farmer who succeeds in using it with safety to himself" is not a reference to the particular defendant but to a section of the community.

Indeed, the Court was at paints to point out *(ibid.)* that "(t)he question is not one to be decided by a jury **on each occasion** as a question of fact" (my emphasis).

Determining what is or is not a natural use of land is often a difficult question. Because that is so, it is not surprising that some decisions seem inconsistent with others. But that does not mean that the principles expounded in Hazelwood result in unprincipled, *ad hoc* decision-making. The criterion of reasonable care in negligence is equally capable of producing decisions which appear to be inconsistent with each other. But no one suggests that they are unprincipled.

It is, of course, true that, like negligence liability, liability under *Rylands v. Fletcher* is not absolute. The *prima facie* liability of the occupier for an escape may be displaced by various defences such as act of God, act of a stranger and consent or default of the plaintiff. But, with the exception of the defence of consent, those defences cannot be equated with the defences of volenti or contributory negligence to an action for negligence. The *Rylands v. Fletcher* defences go to the issue of **causation.** The occupier is not liable under those defences because the act of God or the act of a stranger is a *novus actus interveniens (Benning* [1969] 122 CLR at 298). Furthermore, no defence of contributory negligence is available in an action based on *Rylands v. Fletcher.* Yet, if the rule of that case is incorporated into the law of negligence, the damages of a plaintiff will be liable to be reduced by the extent of that person's fault in contributing to the **damage.**

A further difference between an action for negligence and an action based on *Rylands v. Fletcher* is that in negligence the defendant is liable only for damage which is reasonably foreseeable. It has not yet been held in this country that the defendant in a *Rylands v. Fletcher* action is liable only for damage which is reasonably foreseeable (see *Overseas Tankship (UK) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound)* [1961] AC 388 at 426-427). And since liability in that action is a strict liability, it is inconsistent with its rationale to limit the occupier's liability to damage which was reasonably foreseeable. Until last year, the weight of authority supported this conclusion *(West v. Bristol Tramways Company* [1908] 2 KB 14; and see *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co.* [1921] 2 AC 465). However, the House of Lords has now held that liability under *Rylands v. Fletcher* is limited to damage which is reasonably foreseeable. Their Lordships did so on the ground that the remoteness rule applied to nuisance actions and that, because a *Rylands v. Fletcher* action was an extension of the action for nuisance, it was logical to apply the same remoteness rule to it *(Cambridge Water Co. v. Eastern Counties Leather Co.* [1994] 2 WLR 53 at 79). Logical or not, it is inconsistent with the rationale of the rule in *Rylands v. Fletcher.*

Furthermore, I cannot accept the proposition that, if liability exists under the rule in *Rylands v. Fletcher,* it is highly likely that liability will arise under the ordinary principles of negligence. Hazelwood itself is a convincing answer to that proposition. There the jury expressly found that there was no negligence on the part of defendant or his employees. Yet the Full Court of the Supreme Court of New South Wales was able to hold the defendant liable under Rylands v. Fletcher on the ground that there was a non-natural use of land. This Court upheld the finding of the Full Court. Similarly, in *West v. Bristol Tramways Company* [1908] 2 KB 14, the defendant was held liable under the rule in *Rylands v. Fletcher* although there was a finding of no negligence. It is beside the point that these days a finding of negligence might be made in circumstances similar to those in issue in those cases. What is decisive for present purposes is that liability existed under *Rylands v. Fletcher* even though the occupier had not been negligent. As long as it remains the law that a person is not liable in negligence for a reasonably foreseeable risk of injury unless a reasonably practicable alternative means of avoiding the risk was also available to the defendant, liability will continue to exist under *Rylands v. Fletcher* in cases where it does not exist in negligence.

If plaintiffs were deprived of the benefit of the rule in *Rylands v. Fletcher,* they would often have difficulty in obtaining compensation for their damage. It often happens that the cause of an escape of a harmful product either is unknown or cannot be established on the probabilities. In such cases, proof of negligence is impossible unless the plaintiff can invoke the doctrine of *res ipsa loquitur.* Even when the cause of an escape can be identified, it does not follow that

negligence will be established. If the rule in *Rylands v. Fletcher* is subsumed under negligence liability, it seems inevitable that many defendants, liable under that rule, will escape liability if plaintiffs are confined to actions for negligence and nuisance. In many, perhaps the majority of cases of escape arising from the non-natural use of land, proof of negligence involves a contest between experts as to whether the risk of escape in the process or system was reasonably foreseeable and whether this or that precaution should reasonably have been taken. Such cases are expensive to run and uncertain of result. True it is that most *Rylands v. Fletcher* claims are accompanied by a claim in negligence. However, particularly in trials by Judges without juries, it is often convenient and possible to try the *Rylands v. Fletcher* claim first.

To incorporate the rule in *Rylands v. Fletcher* into the law of negligence by judicial decision would be a far reaching step, going beyond previous developments of the common lay by this Court. Here the Court is dealing with a rule which has been explained and applied by this Court on numerous occasions. It is a fixed rule of law, as imperative as a statutory command. It has been applied in this country for more than one hundred years. Indeed, the formulation of the rule in *Rylands v. Fletcher* was not intended to create a new tort. It "was expressed as only a generalized statement of ancient common law doctrine as exemplified by a variety of earlier cases" *(Benning* [1969] 122 CLR at 294).

One does not have to agree with the result in *State Government Insurance Commission v. Trigwell* [1979] 142 CLR 617 to agree, as I do, with what Mason J. said in that case about departing from the settled rules of the common law. What his Honour said must always be borne in mind before this Court abolishes, extends or modifies a settled rule of the common law. His Honour said *ibid.* at 633-634:

> The Court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The Court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The Court does not, and cannot, carry out investigations or enquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the Court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes to the law. In short, the Court cannot, and does not, engage in the wide-ranging inquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature.
>
> These considerations must deter a Court from departing too readily from a settled rule of the common law and from replacing it with a new rule.

No doubt Courts in general, and this Court in particular, are more ready to alter the rules of the common law and equity than they were in 1979 when *Trigwell* was decided. But the law-making function of a Court is different from that of a legislature. It is merely an incident of the duty to adjudicate disputes between the parties and those who stand in similar situations. A Judge-made rule is legitimate only when it can be effectively integrated into the mass of principles, rules and standards which constitute the common law and equity. A rule which will not "fit" into the general body of the established law cannot be the subject of Judge-made law.

Incorporating the rule in *Rylands v. Fletcher* into the law of negligence might not offend the "fit" principle. But it would require squeezing an established principle of strict liability out of the common law so that the law of negligence can control the field. In an age where the escape of fire, oil, gases, chemicals and even radio-active materials has often caused widespread damage, it is not readily apparent why the common law should now abandon the *prima facie* rule of strict liability established in *Rylands v. Fletcher* for the indeterminacy of the action for negligence. Proximity, remoteness, reasonable care and breach of duty, the bench marks of negligence law, are not formulas for exactness. The wavering history of the law of negligence in relation to the recovery of damages for purely economic loss is eloquent of the inherent indeterminacy of negligence law. Moreover, the common law holds no prejudice against strict liability. As Windeyer J pointed out in *Benning* [1969] 122 CLR at 303 "strict liability was known to the law long before negligence emerged in the nineteenth century as itself a cause of action".

a By abolishing the rule in *Rylands v. Fletcher,* the Court would abolish the rights and potential rights of persons whose property and person have been or will be injured by the escape of dangerous substances. No one can know how many pending cases or existing causes of action will be defeated by the abolition of the rule. If experience is any guide, the recent bushfires in New South Wales will generate at least some *Rylands v. Fletcher* claims.

b Furthermore, in recent years, Law Reform Commissions and equivalent bodies have advocated the enactment of strict liability rules in various areas of social activity which involve the use of substances likely to cause great harm if they escape (see **Great Britain, Royal Commission on Civil Liability and Compensation for Personal Injury,** 1978, Cmnd 7054-1; South Australia, Eighty-Seventh Report of the Law Reform Committee of South Australia to the Attorney-General Relating to Claims for Injuries from Toxic Substances and Radiation Effects, 1985). Clearly the investigations of those bodies have not revealed the superiority of the negligence action to an action based on a *prima facie* rule of strict liability. With great respect c to those who hold the contrary view, more evidence, analysis and argument than was put before this Court in this case is needed before the Court can properly determine whether the rule in *Rylands v. Fletcher* should be banished from the books. In the meantime, we should continue to apply the established rule.

The liability of BPA under Rylands v. Fletcher

d In the last quarter of the twentieth century, the use of welding equipment on an industrial site for the purpose of construction work cannot be regarded as a non-natural use of land. The learned Judges of the Full Court thought a non-natural use of land had occurred because the welding was done in the vicinity of cartons of Isolite. But this is to determine the issue of non-natural use by reference to the manner of performing the work. In that respect, the Full Court was in error. In so far as the action against BPA was based on the rule in *Rylands v. Fletcher,* it must fail.

e *The liability of BPA in negligence*

The action based on negligence must also fail because the defendant is not liable for the negligence of its independent contractor. The reasoning and, in view, the decision of this Court in *Stoneman v. Lyons* [1975] 133 CLR 550, is directly opposed to the proposition that BPA is liable simply because it engaged and authorised Wildridge to carry out work which involved the use of Isolite stored in cardboard cartons and to do extensive welding work. Obviously, the welding f operation carried out by Wildridge involved a real and serious risk of injury unless precautions were taken to eliminate the risk of injury. But it has not yet been held in this Court that that is sufficient to make a person in BPA's position liable for the negligence of an independent contractor.

In *Stoneman,* the owner of land employed a contractor to construct a wall along the boundary of the land immediately adjacent to a building on the adjoining land. The contractor caused the g collapse of the wall of the building when he negligently excavated a trench alongside the wall. This Court held that the owner was not liable for the collapse of the wall. Mason J., with whose judgment Barwick CJ and Gibbs J. agreed, said *ibid.* at 576:

> The principle that in the case of dangerous operations there is a special responsibility to take care does not exclude the liability of a person who engages an independent contractor to undertake an operation which is inherently dangerous and which injures a third party. But to make the principle h liable it must appear that he himself was guilty of some negligent act or omission or that he authorized some negligent act or omission by the contractor in executing the operations which the latter was employed to carry out. Thus it may appear that the principle is liable because he has failed to take care to engage a competent contractor or because, having knowledge that the contractor proposed to execute the work in an unsafe manner, he did nothing to eliminate the danger.

Stephen J. said ibid. at 564:

i > An employer will, whether or not the activity is regarded as extra-hazardous, be liable in negligence for the consequences to third parties both of acts which he specifically authorizes or directs and of

> methods not so authorized but which are necessarily involved in performing those acts. For the consequences of other negligent conduct of the contractor the employer will not be liable; he did not, in the language of Jordan CJ have control over that conduct.

In the present case, as in *Stoneman*, BPA did not engage an incompetent contractor. Nor did it have knowledge "that the contractor proposed to execute the work in an unsafe manner". It cannot be held liable for the negligence of Wildridge.

The appeal must be allowed.